Official Gazette

REPUBLIC OF THE PHILIPPINES

Edited at the Office of the President, under Commonwealth Act No. 638
Entered as second-class matter, Manila Post Office, December 26, 1905

VOL. 47 MANILA, PHILIPPINES, SEPTEMBER 1951 No. 9

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THE OFFICIAL MONTH IN REVIEW

THE President entered Johns Hopkins hospital at 3 a.m., September 1, Manila time (3 p.m., August 31, Baltimore time). He arrived in Baltimore by motor car from Washington, accompanied by Foreign Secretary Carlos P. Romulo, Ambassador Joaquin M. Elizalde, his daughter Vicky, his son-in-law Chito Gonzalez, and members of his staff. He was given a preliminary examination by Dr. Colston who operated on him in Johns Hopkins Hospital in 1950.

ON September 2 (Baltimore time), the President's physician said that the result of the check-ups made on the President showed that he was not suffering from any serious sickness. Dr. Colston, however, ordered that the President be confined for complete and absolute rest at the hospital where he was still undergoing observation.

On the same day, President Quirino opened office on the second floor of the Sheraton-Belvedere hotel and summoned Minister Emilio Abello from New York to take charge of the office. The President wanted constant consultation with the Philippine delegates to the Japanese peace treaty conference. He was also in constant consultation with PHILCUSA Chairman Jose Yulo on PHILCUSA matters.

ON September 3, Johns Hopkins physicians said that President Quirino must be confined in the hospital for not less than two weeks for a quantitative evaluation of the condition of his heart, kidney, and arteries.

DESPITE doctors' strict orders for complete rest, the President on September 4 worked on important state papers and busied himself with a series of telephone conversations with the Philippine delegation to the peace treaty conference in San Francisco. He closeted himself with Minister Emilio Abello and Assistant Private Secretary Juanito C. Gella in his Johns Hopkins hospital room and pored over important state papers. He created a committee composed of OEC Administrator Salvador Araneta, Finance Secretary Pio Pedrosa, and Auditor General Manuel Agregado to study an offer of the Philippine Sugar Institute to purchase the government's Insular Sugar Refining Company and to make recommendations on the same. The President also authorized the release of ₱1,984,400 to the Manila Railroad Company for the purchase of ten locomotives from Japan.

THE President kept himself posted on the progress of the Japanese peace treaty conference at San Francisco spending the whole day, September 6, on the television set in his room at the Johns Hopkins hospital. He was in constant consultation with Foreign Secretary Carlos P. Romulo, head of the Philippine delegation to the peace treaty confab. Ministers Emilio Abello and Manuel Escudero kept the President company during the whole day.

GOVERNOR Theodore McKeldin of Maryland called on President Quirino early in the evening of September 7 at the Johns Hopkins hospital. The President also conferred with RFC Chairman Placido L. Mapa prior to the latter's projected visit to Mexico and Central America on an official mission.

EXECUTIVE ORDERS, PROCLAMATIONS AND ADMINISTRATIVE ORDERS

MALACAÑAN PALACE
MANILA

BY THE PRESIDENT OF THE PHILIPPINES

PROCLAMATION NO. 275

CALLING FOR A SPECIAL ELECTION TO FILL AN EXISTING VACANCY IN THE SENATE

WHEREAS, the Secretary of the Senate has certified that a vacancy exists in the Senate as a result of the election and qualification as Vice President of former Senator Fernando Lopez whose term will expire on December 30, 1953;

NOW, THEREFORE, by virtue of the authority conferred upon me by section 20 of Republic Act No. 180, known as the Revised Election Code, I, Elpidio Quirino, President of the Philippines, hereby issue this proclamation and call a special election to take place in the entire Philippines on Tuesday, the thirteenth day of November, nineteen hundred and fifty-one, to coincide with the general elections for provincial and municipal officials and for eight senators, for the purpose of electing the member who will fill the unexpired portion of the term of former Senator Fernando Lopez.

The provisions of the Revised Election Code insofar as they are applicable shall be followed in the conduct of the special election herein called.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Republic of the Philippines to be affixed.

Done in the City of New York, N. Y., U. S. A. (for the City of Manila), this 24th day of September, in the year of Our Lord, nineteen hundred and fifty-one, and of the Independence of the Philippines, the sixth.

[SEAL]

ELPIDIO QUIRINO
President of the Philippines

By the President:

MARCIANO ROQUE
Acting Assistant Executive Secretary

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MALACAÑAN PALACE
MANILA

BY THE PRESIDENT OF THE PHILIPPINES

PROCLAMATION NO. 276

CALLING FOR A SPECIAL ELECTION TO ELECT THE REPRESENTATIVE FOR THE SOLE REPRESENTATIVE DISTRICT OF THE NEW PROVINCE MINDORO OCCIDENTAL.

WHEREAS, section 6 of Republic Act No. 505, creating the Province of Mindoro Oriental and Mindoro Occidental. authorizes the calling of a special election for the purpose of electing the Representative for the sole representative district of the Province of Mindoro Occidental;

NOW, THEREFORE, by virtue of the authority conferred upon me by section 20 of Republic Act No. 180, known as the Revised Election Code, I, Elpidio Quirino, President of the Philippines, hereby issue this proclamation and call a special election in the sole representative district of the Province of Mindoro Occidental to take place on Tuesday, the thirteenth day of November, nineteen hundred and fifty-one, to coincide with the general elections for provincial and municipal officials and for eight senators, for the purpose of electing the Member of the House of Representatives for said province whose term of office will terminate on December thirtieth, nineteen hundred and fifty-three.

The provisions of the Revised Election Code insofar as they are applicable shall be followed in the conduct of the special election herein called.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Republic of the Philippines to be affixed.

Done in the City of New York, N. Y., U. S. A. (for the City of Manila), this 24th day of September, in the year of Our Lord, nineteen hundred and fifty-one, and of the Independence of the Philippines, the sixth.

[SEAL]

ELPIDIO QUIRINO
President of the Philippines

By the President:

MARCIANO ROQUE
Acting Assistant Executive Secretary

MALACAÑAN PALACE
MANILA

BY THE PRESIDENT OF THE PHILIPPINES

PROCLAMATION NO. 277

CALLING FOR A SPECIAL ELECTION TO FILL AN EXISTING VACANCY IN THE HOUSE OF REPRESENTATIVES.

WHEREAS, the Speaker of the House of Representatives has certified that a vacancy exists in the second representative district of the Province of Rizal;

NOW, THEREFORE, by virtue of the authority conferred upon me by section 20 of Republic Act No. 180, known as the Revised Election Code, I, Elpidio Quirino, President of the Philippines, hereby issue this proclamation and call a special election in the second representative district of the Province of Rizal to take place on Tuesday, the thirteenth day of November, nineteen hundred and fifty-one, to coincide with the general elections for provincial and municipal officials and for eight senators, for the purpose of electing the member who is to fill the unexpired portion of the term of the existing vacancy in the House of Representatives corresponding to said province.

The provisions of the Revised Election Code insofar as they are applicable shall be followed in the conduct of the special election herein called.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Republic of the Philippines to be affixed.

Done in the City of New York, N. Y., U. S. A. (for the City of Manila), this 24th day of September, in the year of Our Lord, nineteen hundred and fifty-one, and of the Independence of the Philippines, the sixth.

[SEAL] ELPIDIO QUIRINO
President of the Philippines

By the President:

MARCIANO ROQUE
Acting Assistant Executive Secretary

MALACAÑAN PALACE
MANILA

BY THE PRESIDENT OF THE PHILIPPINES

PROCLAMATION NO. 278

CALLING FOR A SPECIAL ELECTION TO FILL AN EXISTING VACANCY IN THE HOUSE OF REPRESENTATIVES.

WHEREAS, the Speaker of the House of Representatives has certified that a vacancy exists in the sole representative district of the Province of Zambales;

NOW, THEREFORE, by virtue of the authority conferred upon me by section 20 of Republic Act No. 180, known as the Revised Election Code, I, Elpidio Quirino, President of the Philippines, hereby issue this proclamation and call a special election in the sole representative district of the Province of Zambales to take place on Tuesday, the thirteenth day of November, nineteen hundred and fifty-one, to coincide with the general elections for provincial and municipal officials and for eight senators, for the purpose of electing the member who is to fill the unexpired portion of the term of the existing vacancy in the House of Representatives corresponding to said province.

The provisions of the Revised Election Code insofar as they are applicable shall be followed in the conduct of the special election herein called.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Republic of the Philippines to be affixed.

Done in the City of New York, N. Y., U. S. A. (for the City of Manila), this 24th day of September, in the year of Our Lord, nineteen hundred and fifty-one, and of the Independence of the Philippines, the sixth.

[SEAL]

ELPIDIO QUIRINO
President of the Philippines

By the President:

MARCIANO ROQUE
Acting Assistant Executive Secretary

CORRECTION!

In Executive Order No. 466, reclassifying all municipalities of the Philippines published in the August, 1951 issue, on page 3880 thereof under RIZAL, second column, the municipality of "San Juan del Monte ..... Fourth," *should read:* San Juan del Monte ..... First-A.

RESOLUTIONS OF CONGRESS

SECOND CONGRESS OF THE REPUBLIC OF THE PHILIPPINES

Third Special Session

S. Ct. R. 15

[CONCURRENT RESOLUTION No. 17]

CONCURRENT RESOLUTION AUTHORIZING THE APPOINTMENT OF A JOINT COMMITTEE OF BOTH HOUSES TO NOTIFY THE PRESIDENT OF THE PHILIPPINES THAT THE CONGRESS IS NOW ASSEMBLED IN THIRD SPECIAL SESSION AND IS READY TO RECEIVE HIS MESSAGE.

Resolved by the Senate, the House of Representatives of the Philippines concurring, To authorize, as it hereby authorizes, the appointment of a joint committee of both Houses of the Congress to be composed of six members, three to be appointed by the President of the Senate, and the other three by the Speaker of the House of Representatives, to notify the President of the Philippines that the Congress is now assembled in third special session and is ready to receive any such communication as the Chief Executive may deem fit to send.

Adopted, December 4, 1950.

H. Ct. R. No. 61

[CONCURRENT RESOLUTION No. 18]

CONCURRENT RESOLUTION PROVIDING THAT THE SENATE AND THE HOUSE OF REPRESENTATIVES HOLD A JOINT SESSION TO HEAR THE MESSAGE OF THE PRESIDENT OF THE PHILIPPINES.

Resolved by the House of Representatives of the Philippines, the Senate concurring, That both Houses of the Congress of the Philippines hold a joint session on December four, nineteen hundred and fifty at four-thirty o'clock in the afternoon in the Session Hall of the House of Representatives, to hear the message of the President of the Philippines.

Adopted, December 4, 1950.

S. Ct. R. No. 17

[CONCURRENT RESOLUTION No. 19]

CONCURRENT RESOLUTION PROVIDING FOR THE ADJOURNMENT OF THE THIRD SPECIAL SESSION OF THE SECOND CONGRESS OF THE REPUBLIC OF THE PHILIPPINES FROM DECEMBER TWENTY-THREE, NINETEEN HUNDRED AND FIFTY, TO JANUARY TWO,

NINETEEN HUNDRED AND FIFTY-ONE, INCLUSIVE.

Resolved by the Senate, the House of Representatives of the Philippines, concurring, That the Third Special Session of the Second Congress of the Republic of the Philippines be adjourned from December twenty-three, nineteen hundred and fifty, to January two, nineteen hundred and fifty-one, inclusive.

Adopted, December 22, 1950.

SECOND CONGRESS OF THE REPUBLIC OF THE PHILIPPINES

Second Session

S. Ct. R. No. 20

[CONCURRENT RESOLUTION No. 20]

CONCURRENT RESOLUTION AUTHORIZING THE APPOINTMENT OF A JOINT COMMITTEE OF BOTH HOUSES TO NOTIFY THE PRESIDENT OF THE PHILIPPINES THAT THE CONGRESS IS NOW ASSEMBLED IN SECOND SESSION AND IS READY TO RECEIVE HIS MESSAGE.

Resolved by the Senate, the House of Representatives of the Philippines concurring, To authorize, as it hereby authorizes, the appointment of a joint committee of both Houses of the Congress to be composed of six members, three to be appointed by the President of the Senate, and the other three by the Speaker of the House of Representatives, to notify the President of the Philippines that the Congress is now assembled in second session and is ready to receive any such communication as the Chief Executive may deem fit to send.

Adopted, January 22, 1951.

H. Ct. R. No. 69

[CONCURRENT RESOLUTION No. 21]

CONCURRENT RESOLUTION PROVIDING THAT THE SENATE AND THE HOUSE OF REPRESENTATIVES HOLD A JOINT SESSION TO HEAR THE MESSAGE OF THE PRESIDENT OF THE PHILIPPINES.

Resolved by the House of Representatives of the Philippines, the Senate concurring, That both Houses of the Congress of the Philippines hold a joint session on January 22, 1951 at five o'clock in the afternoon in the Session Hall of the House of Representatives, to hear the message of the President of the Philippines.

Adopted, January 22, 1951.

H. Ct. R. No. 70

[CONCURRENT RESOLUTION No. 22]

CONCURRENT RESOLUTION PROVIDING THAT THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE PHILIPPINES HOLD A JOINT SESSION IN HONOR OF THE PRESIDENT OF THE REPUBLIC OF INDONESIA.

Resolved by the House of Rcpresentatives of the Philippines, the Senate concurring, That both Houses of the Congress of the Philippines hold a joint session on January twenty-nine, nineteen hundred and fifty-one, at ten o'clock in the morning in the Session Hall of the House of Representatives in honor of the President of the Republic of Indonesia.

Adopted, January 26, 1951.

H. Ct. R. No. 65
S. Ct. R. No. 19

[CONCURRENT RESOLUTION No. 23]

CONCURRENT RESOLUTION EXPRESSING THE SENSE OF THE CONGRESS OF THE PHILIPPINES TO GIVE PREFERENTIAL AND SERIOUS CONSIDERATION TO THE MAIN RECOMMENDATIONS OF THE ECONOMIC SURVEY MISSION TO THE PHILIPPINES.

Resolved by the House of Representatives of the Philippines, the Senate concurring, To declare that it is the sense of Congress that preferential and serious consideration should be given to the main recommendations of the Economic Survey Mission to the Philippines with a view to accelerating by further legislation such social reform, economic development, and other measures as will strengthen democratic and free institutions in the Philippines.

Adopted, February 2, 1951.

S. Ct. R. No. 24

[CONCURRENT RESOLUTION No. 24]

CONCURRENT RESOLUTION PROVIDING FOR THE ADJOURNMENT OF THE SECOND SESSION OF THE SECOND CONGRESS OF THE REPUBLIC OF THE PHILIPPINES FROM MARCH NINETEEN, NINETEEN HUNDRED AND FIFTY-ONE, TO MARCH TWENTY-FOUR, OF THE SAME YEAR, INCLUSIVE.

Resolved by the Senate, the House of Representatives of the Philippines concurring, That the Second Session of the Second Congress of the Republic of the Philippines be adjourned from March nineteen, nineteen hundred and fifty-one, to March twenty-four, of the same year, inclusive.

Adopted, March 16, 1951.

H. Ct. R. No. 80

[CONCURRENT RESOLUTION No. 25]

CONCURRENT RESOLUTION REQUESTING THE PRESIDENT OF THE PHILIPPINES TO MAKE REPRESENTATIONS WITH THE GOVERNMENT OF THE UNITED STATES FOR THE EXTENSION UP TO JUNE THIRTY, NINETEEN HUNDRED FIFTY-TWO, OF THE PERIOD OF THE COMPLETION OF THE PROGRAM FOR THE REHABILI-

TATION OF HIGHWAYS AND BRIDGES IN THE PHILIPPINES IN ACCORDANCE WITH THE PHILIPPINE REHABILITATION ACT OF 1946.

WHEREAS, in accordance with the Philippine Rehabilitation Act of 1946, a program was made for the rehabilitation of highways and bridges in the Philippines involving the expenditure of ₱100,000,000, consisting of ₱80,000,000 as contribution from the United States Government and ₱20,000,000 as contribution from the Government of the Philippines;

WHEREAS, there still remains to be appropriated by the United States Congress the sum of $3,000,000 or ₱6,000,000 to complete the share of the United States Government under said program;

WHEREAS, the said Act, as amended, provides that no further expenditure shall be made of funds authorized therein beyond June 30, 1951;

WHEREAS, due to causes beyond the control of the Government of the Philippines or that of the contractors engaged in the rehabilitation projects under said program, such as the peace and order conditions in several provinces in Luzon and in the Visayas and the delay in the shipment of steel and other construction materials due to strikes and other causes in the United States, it will be impossible to complete the big rehabilitation projects under said program by June 30, 1951;

WHEREAS, the amount of funds which can still be used if the period of the rehabilitation activities under said program is extended are as follows: (1) $3,000,000, which has not yet been appropriated by the United States Congress, (2) $2,300,000, which is the approximate figure representing projects which cannot be finished by June 30, 1951, and (3) $150,000, which is the approximate balance from administrative expenses;

WHEREAS, the said total sum of $5,450,000 or ₱10,900,000 will revert to the Treasury of the United States unless the period of the rehabilitation activities in accordance with the Philippine Rehabilitation Act of 1946 is extended by the United States Government;

WHEREAS, it was the purpose of the people and Government of the United States in enacting said Act to manifest their good-will towards the Filipino people by aiding them in the rehabilitation of the Philippines;

WHEREAS, for the full realization of the said good-will of the American people and Government towards the Filipino people and in order that the rehabilitation program envisioned in said Act may be fully carried out and completed, it is necessary that the period for the completion of said program be extended to June 30, 1952: Now, therefore, be it

Resolved by the House of Representatives of the Philippines, the Senate concurring, To request the President of the Philippines to make representations with the Government of the United States for an amendment of the Philippine Rehabilitation Act of 1946 extending to June thirty, nineteen hundred fifty-two, the time within which to complete the program for the rehabilitation of highways and bridges in the Philippines in accordance with the provisions of said Act.

Adopted, April 9, 1951.

H. Ct. R. No. 31
S. Ct. R. No. 26

[CONCURRENT RESOLUTION No. 26]

CONCURRENT RESOLUTION CREATING A JOINT COMMITTEE OF BOTH HOUSES TO STUDY AMENDMENTS TO THE CONSTITUTION TO BE PROPOSED BY CONGRESS IN JOINT SESSION.

WHEREAS, the national experience in the years since the promulgation of the Constitution of the Philippines has established the need for further amendments to that Constitution; and

WHEREAS, many resolutions proposing amendments to the Constitution have been introduced in both Houses of the Congress of the Philippines, and it is the sense of this Congress that the right time to adopt a resolution of both Houses proposing amendments to the Constitution is during the present session, in order that such amendments may be submitted to the people for their ratification at the election scheduled to be held this year, 1951: Now, therefore, be it

Resolved by the House of Representatives of the Philippines, the Senate concurring, That a Joint Committee of both Houses be, and the same hereby is, created to study amendments to the Constitution, including those proposed in all the resolutions introduced in both Houses; prepare a resolution of both Houses proposing the constitutional amendments which it may find necessary, and submit the same to both Houses, together with its comments and recommendations, not later than May 10, 1951. The Committee shall be composed of nine Senators selected by the Senate and nine Representatives selected by the House of Representatives, six to be chosen from the majority and three from the minority in each House in accordance with their respective Rules.

Adopted, April 24, 1951.

S. Ct. R. No. 10

[CONCURRENT RESOLUTION No. 27]

CONCURRENT RESOLUTION DECLARING THE LATE SENATORS HARRY B. HAWES AND BRONSON CUTTING HONORARY CITIZENS POSTHUMOUSLY, AND FORMER CONGRESSMAN BUTLER HARE HONORARY CITIZEN OF THE PHILIPPINES.

WHEREAS, Senators Harry B. Hawes and Bronson Cutting, deceased, and former Congressman Butler Hare sponsored and authored an act providing for the independence of the Philippines which was approved by the United States Congress;

WHEREAS, said act paved the way for the adoption by the United States Congress of an act which finally granted the Filipino people complete independence; and

WHEREAS, the Filipino people are infinitely grateful for the services so unselfishly rendered by the said Senators Harry B. Hawes and Bronson Cutting, and former Con-

gressman Butler Hare to the cause of Philippine independence: Now, therefore, be it

Resolved by the Senate, the House of Representatives of the Philippines concurring, That in recognition of the role played by them in the fulfillment of the Filipino people's aspiration for freedom, the late Senators Harry B. Hawes and Bronson Cutting be made, as hereby they are declared to be honorary citizens posthumously, and Congressman Butler Hare, honorary citizen of the Philippines.

Adopted, May 7, 1951.

H. Ct. R. No. 87

[CONCURRENT RESOLUTION No. 28]

CONCURRENT RESOLUTION PROVIDING FOR THE ADJOURNMENT OF THE SECOND SESSION OF THE SECOND CONGRESS OF THE REPUBLIC OF THE PHILIPPINES, TODAY, THURSDAY, MAY SEVENTEEN, NINETEEN HUNDRED AND FIFTY-ONE, NOT LATER THAN TWELVE O'CLOCK MIDNIGHT.

Resolved by the House of Representatives of the Philippines, the Senate concurring, That the President of the Senate and the Speaker of the House of Representatives be, as they hereby are, authorized to declare the Second Session of the Second Congress of the Republic of the Philippines adjourned *sine die,* by adjourning the sessions of their respective Houses today, Thursday, May seventeen, nineteen hundred and fifty-one, not later than twelve o'clock midnight.

Resolved, further, That a committee of three members of the House, appointed by the Speaker of the same, join a committee of the Senate, and wait on the President of the Philippines to inform him that the Second Session of the Second Congress of the Republic of the Philippines is about to close, and that the two Houses are ready to adjourn, unless the Chief Eexcutive has some message or communication to transmit to them.

Adopted, May 17, 1951.

DEPARTMENT AND BUREAU ADMINISTRATIVE ORDERS AND REGULATIONS

Department of Finance

BUREAU OF INTERNAL REVENUE

REVENUE REGULATIONS No. V–15

July 24, 1951

AMENDMENT TO SECTION 24 OF REGULATIONS NO. 17, AS AMENDED BY REVENUE REGULATIONS NO. V-9, OTHERWISE KNOWN AS THE INTERNAL REVENUE LEAF TOBACCO REGULATIONS.

To all Internal Revenue Officers and others concerned:

Pursuant to the provisions of section 338, in relation to section 4, of the National Internal Revenue Code, the following regulations amending section 24 of Regulations No. 17, as amended, otherwise known as the Internal Revenue Leaf Tobacco Regulations, are hereby promulgated and shall be known as Revenue Regulations No. V–15.

SECTION 1. Section 24 of Regulations No. 17, as amended by Revenue Regulations No. V–9, is hereby further amended to read as follows:

"SEC. 24. *Limitation on retail leaf tobacco dealers.*—A retail leaf tobacco dealer may purchase leaf tobacco in standard packages only, and from persons furnished with official register books (B.I.R. Form No. 31.46), but in no case may his total purchases in any one calendar month exceed two hundred (200) kilos of the ordinary or "lizo" type of leaf tobacco.

"Notwithstanding the limitation prescribed above, wholesale leaf tobacco dealers may, upon special permit secured from the Collector of Internal Revenue, if in Manila, or from the Provincial Revenue Agent, if in the provinces, sell to each retail dealer leaf tobacco belonging to the thick or heavy types of leaf tobacco, officially classified and marked as "Batek", "Champorado", "Morado", "Solkok" (Ilocano), "Katabakuan" (Ibanag), "Paniagan" or "Escogido" (Visayan), characterized either by the presence of large reddish brown spots (not white spots or frog's eyes—*Cercosphora nicotiana*) or large and prominent veins, or both, not exceeding 600 kilos standard weight in one calendar month, in addition to 200 kilos a month of the ordinary or "lizo" type of leaf tobacco. No such permit shall be issued unless an application under oath shall have been filed first by the seller stating that the tobacco to be sold belongs to the heavy types of leaf tobacco and certified to as such by a tobacco inspector, internal revenue agent, or deputy provincial treasurer (the latter only in case of non-availability of the former), and upon verification made of the content of each bale prior to removal from the seller's warehouse. The application for permit should be accomplished by the written order, by letter or telegram, of the buyer. For accounting purposes, the type or types of leaf tobacco sold and its selling price shall be indicated in the official guia and stub and in the retailer's purchase book, as well as in the advice slip. To distinguish the type or types of leaf tobacco sold under this provision, a separate column shall be provided in both the debit and credit pages of the official register book of the wholesale leaf tobacco dealer for the purpose of entering the receipts and sales of the heavy types of leaf tobacco.

"A retail leaf tobacco dealer shall keep a purchase book, which shall show the following items for each purchase made by him; (1) the date of purchase (2) the quantity purchased; (3) the name of the wholesale leaf tobacco dealer from whom purchased; (4) the schedule, paragraph and assessment number of the wholesale leaf tobacco dealer; and (5) the signature of the wholesale leaf tobacco dealer. When making a purchase, the retail leaf tobacco dealer should present his purchase book to the wholesale leaf tobacco dealer, who shall enter the sale on the purchase book and affix his signature after the entry. Before the retail leaf tobacco dealer's purchase book is used, it shall first be approved by, and registered with, the Collector of Internal Revenue, if in Manila, or the Provincial Revenue Agent, if in the province.

"A retail leaf tobacco dealer shall sell leaf tobacco only to consumers and by weight, which shall not be more than one kilo in one month to any one person. Each sale shall be duly recorded by such dealer in his sales book, showing the date of sale, the quantity sold, and the name and address of the purchaser.

"Before a retail leaf tobacco dealer can secure the corresponding privilege tax receipt from the city or deputy provincial treasurer concerned or renew a privilege tax receipt issued before the effective date of these regulations, he shall first file an application under oath with the Collector of Internal Revenue, if in Manila, or with the Provincial Revenue Agent, if in the province, and after investigation, a certificate of authority shall be issued. This certificate of authority shall be renewed every year and an application for its renewal shall be made not less than thirty days before January 1 of each year. No city or deputy provincial treasurer shall issue a privilege tax receipt to a retail leaf tobacco dealer or renew a privilege tax receipt previously issued except upon the exhibition of the certificate of authority issued by the Collector of Internal Revenue or by the Provincial Revenue Agent, as the case may be. The Collector of Internal Revenue may cancel and demand the surrender of the certificate of authority issued to a retail leaf tobacco dealer if the holder thereof violates any provision of the Internal Revenue Leaf Tobacco Regulations, as amended.

SEC. 2. These regulations shall take effect upon publication in the *Official Gazette*.

SIXTO B. ORTIZ
Undersecretary of Finance

Recommended by:

S. DAVID
Collector of Internal Revenue

Department of Justice

ADMINISTRATIVE ORDER NO. 149

September 11, 1951

CHANGING THE DATE OF THE HOLDING OF COURT SESSIONS IN MARINDUQUE AND AUTHORIZING JUDGE EUSEBIO RAMOS TO HOLD COURT IN LUBANG, MINDORO OCCIDENTAL DURING THE MONTH OF SEPTEMBER.

In the interest of the administration of justice, the holding of court sessions in Marinduque by Judge Eusebio Ramos from August 7 to 24, 1951 instead of September, 1951, for the purpose of trying all kinds of cases and to enter judgments therein is hereby authorized.

He is also hereby authorized to hold court in Lubang, Mindoro Occidental, during the month of September, 1951, for the purpose of trying all kinds of cases and to enter judgments therein.

CEFERINO DE LOS SANTOS
Underseeretary

ADMINISTRATIVE ORDER NO. 150

September 15, 1951

AUTHORIZING CADASTRAL JUDGE JOSE BONTO TO DECIDE A CIVIL CASE IN CABANATUAN CITY

In the interest of the administration of justice and upon request of Cadastral Judge Jose Bonto, he is hereby authorized to decide in Cabanatuan City, civil case No. 9789 of the Court of First Instance of Pangasinan entitled, "Pedro de la Cruz et al., plaintiffs, *vs.* Feliciana Vda. de Blando et al., defendants" which was previously tried by him while holding court in said province.

CEFERINO DE LOS SANTOS
Undersecretary

ADMINISTRATIVE ORDER NO. 151

September 17, 1951

TRANSFERRING THE COURT TERM IN BONTOC, MOUNTAIN PROVINCE SO AS TO BEGIN ON THE THIRD TUESDAY OF NOVEMBER.

In the interest of the administration of justice and pursuant to the provisions of section 54 of Republic Act No. 296, last paragraph, the court term in Bontoc, Mountain Province, which by law should begin on the first Tuesday of November, 1951 is hereby transferred so as to begin on the third Tuesday of November of the same year.

CEFERINO DE LOS SANTOS
Undersecretary

ADMINISTRATIVE ORDER NO. 152

September 24, 1951

APPOINTING SPECIAL COUNSEL PANTALEON DE LA PEÑA ACTING CITY ATTORNEY OF CAGAYAN DE ORO CITY.

In the interest of the public service and pursuant to the provisions of section 1679 of the Revised Administrative Code, Mr. Pantaleon de la Peña, Special Counsel of Misamis Oriental, is hereby appointed Acting City Attorney of Cagayan de Oro City, effective September 1, 1951, with compensation provided by law for the position and to continue until further orders or until the regular City Attorney thereof shall have been appointed.

CEFERINO DE LOS SANTOS
Underseeretary

ADMINISTRATIVE ORDER NO. 154

September 28, 1951

DETAILING TEMPORARILY MR. CONSTANTE ROSAL TO DISCHARGE THE DUTIES OF PROVINCIAL FISCAL OF ABRA.

In the interest of the public service and pursuant to the provisions of section 1680 of the Revised Administrative Code, Mr. Constante Rosal, Assistant Provincial Fiscal of Ilocos Sur, is hereby temporarily detailed to the Province of Abra, there to discharge the duties of provincial fiscal thereof, effective immediately and to continue until further orders.

CEFERINO DE LOS SANTOS
Undersecretary of Justiee

ADMINISTRATIVE ORDER NO. 155

September 29, 1951

AUTHORIZING JUDGE-AT-LARGE MANUEL M. MEJIA TO HOLD COURT IN DAGUPAN, PANGASINAN, BEGINNING OCTOBER 2, 1951.

In the interest of the administration of justice and pursuant to the provisions of section 56 of Republic Act 296, the Honorable Manuel M. Mejia, Judge-at-Large, is hereby authorized to hold court in Dagupan, Pangasinan, beginning October 2, 1951 or as soon thereafter as practicable, for the purpose of trying all kinds of cases and to enter judgments therein.

CEFERINO DE LOS SANTOS
Undersecretary of Justiee

ADMINISTRATIVE ORDER NO. 156

September 29, 1951

AUTHORIZING JUDGE LUIS ORTEGA TO HOLD COURT IN CALAMBA, LAGUNA FROM OCTOBER 1, 1951 TO NOVEMBER 15, 1951.

In the interest of the administration of justice and pursuant to the provisions of section 56

of Republic Act 296, the Honorable Luis Ortega, Judge of the Eighth Judicial District, Laguna, Second Branch, is hereby authorized to hold court in the municipality of Calamba, Province of Laguna, from October 1, 1951 to November 15, 1951 for the purpose of trying all kinds of cases and to enter judgments therein.

CEFERINO DE LOS SANTOS
Undersecretary

Department of Agriculture and Natural Resources

OFFICE OF THE SECRETARY

FORESTRY ADMINISTRATIVE ORDER NO. 4–2

July 5, 1951

AMENDMENTS TO FORESTRY ADMINISTRATIVE ORDER NO. 8-3, KNOWN AS THE REVISED REGULATIONS GOVERNING SPECIAL USES OF FOREST LANDS.

1. Section 3, of Forestry Administrative Order No.8-3 of July 1, 1941, known as the Revised Regulations Governing Special Uses of Forest Lands, as amended by Forestry Administrative Order No. 4–1, is hereby further to read as follows:

"3. *Schedule of fees, rentals and area.*—Except as hereinafter provided, the forestry fees, rentals and maximum area for each kind of special uses of forest lands shall be as follows:

Kinds	Forestry fee (1) for each application	Rental (1) per hectare or fraction	Maximum area in hectare
Bathing Establishment	₱5.00	₱5.00	24
Hotel Site	5.00	5.00	24
Nipa and/or other palms bacauan plantation	5.00	5.00	200
Private Camp or residence	2.00	2.00	24
Right-Of-Way	5.00	5.00	[3] 200
Saltworks	5.00	5.00	[3] 200
Sanatorium	5.00	5.00	24
Sawmill Site	5.00	5.00	24
Lumber Yard	5.00	5.00	24
Timber Depot	5.00	5.00	24
Logging Camp Site	5.00	5.00	24
Log Pond	5.00	5.00	24
Kaiñgin	1.00	1.00	1
Lime and Charcoal Kiln	2.00	5.00	24
Pasture	(*b*)	0.60	2,000
Plantation of medicinal plants or trees of economic value	([2])	0.60	[3] 2,000
Other (uses) lawful purposes	2.00	2.00	24

N.B. (1) Payable only to the Director of Forestry, Manila.
(2) Five pesos (₱5.00) for every 500 hectares or fraction thereof.
(3) Republic Act No. 121, June 14, 1947.
(4) May be paid to the Municipal Treasurer.

2. *Date of taking effect.*—This Order shall take effect on August 1, 1951.

FERNANDO LOPEZ
Secretary of Agriculture and Natural Resources

Recommended by:

FLORENTINO TAMESIS
Director of Forestry

FORESTRY ADMINISTRATIVE ORDER NO. 6–1

July 5, 1951

AMENDMENTS TO FORESTRY ADMINISTRATIVE ORDER NO. 10–1, AS AMENDED, KNOWN AS THE REGULATIONS GOVERNING THE COLLECTION, POSSESSION, TRANSPORTATION, SALE OR EXPORT OF PROTECTED WILD PLANTS IN THE PHILIPPINES.

1. Paragraph (*c*) of section 15 of Forestry Administrative Order No. 10–1, known as the Regulations Governing the Collection, Possession, Transportation, Sale of Export of Protected Wild Plants in the Philippines, as amended by Forestry Administrative Order No. 6, is hereby further amended to read as follows:

"(*c*) Fees *for permit to transport wild plants.*—For every permit issued by a forest officer or any person duly authorized as provided in section 3 of this Order there shall be collected the following fees:

(*a*) For permit to transport 24 wild plants or less	₱1.00
(*b*) For permit to transport 25 but not more than 50 wild plants	2.00
(*c*) For permit to transport more than 50 wild plants	3.50

2. Section 19 of the above-mentioned Order is also hereby further amended to read as follows:

"19. *License fees.* The fees for the following licenses shall be:

(*a*) For a collector's license	₱30.00
(*b*) For a personal or semi-public gratuitous license	5.00

3. *Date of taking effect.*—This Order shall take effect on August 1, 1951.

FERNANDO LOPEZ
Secretary of Agriculture and Natural Resources

Recommended by:

FLORENCIO TAMESES
Director of Forestry

FORESTRY ADMINISTRATIVE ORDER NO. 15

July 5, 1951

AMENDMENT TO FORESTRY ADMINISTRATIVE ORDER NO 9, KNOWN AS THE MINING TIMBER REGULATIONS

1. Paragraph (*a*) of section 3 of Forestry Administrative Order No. 9, known as the Mining Timber Regulation is hereby amended to read as follows:

"3. *Classes of Licenses.*—Licenses issued under this Order shall be one of the following classes, namely:

"(*a*) Miner's gratuitous license which may be issued by the Director of Forestry for the cutting and removal of timber on a mining claim or group of claims to be used solely for the development of the said claim or claims. Before the issuance of such license, the applicant is required to pay a license fee of ₱2 per claim irrespective as to whether such claims are contiguous or separated from each other and are non-contiguous. The fee prescribed herein must accompany the corresponding application preferably in postal money order or duly certified check payable to the Director of Forestry, Manila.

* * * * * * *

2. *Date of taking effect.*—This Order shall take effect on August 1, 1951.

FERNANDO LOPEZ
Secretary of Agricutlure and Natural Resources

Recommended by:

FLORENCIO TAMESIS
Director of Forestry

FORESTRY ADMINISTRATIVE ORDER NO. 16

July 5, 1951

AMENDMENTS TO FORESTRY ADMINISTRATIVE ORDER NO. 15, DATED JULY 31, 1935, KNOWN AS THE RULES AND REGULATIONS PRESCRIBING SCHEDULE OF CHARGES FOR SERVICES RENDERED AND ARTICLES SOLD OR FURNISHED.

1. Paragraph (*e*) of section 11 of Forestry Administrative Order No. 15, known as the Rules and Regulations Prescribing Schedule of Charges for Services Rendered and Articles Sold or Furnished, as amended by Forestry Administrative Order No. 15–6, is hereby further amended to read as follows:

"11. Except as otherwise specifically provided by law, the fees to be charged for certification of copies of documents in the custody of the Bureau of Forestry as to whether or not a mining claim is inside any established forest reserve, national park, communal forest or communal pasture, shall be as follows:

* * * * * * *

"(*e*) For certification of each of a group of mining claims covered thereby, as to whether or not the same is inside any established forest reserve, national park, communal forest or communal pasture, of not more than one hundred hectares ..... ₱20.00

2. Three new sub-sections to be known as sub-sections (*f*), (*fi*) and (*h*) are hereby inserted after sub-section (*e*) of section 11 of the said Forestry Administrative Order No. 15 to read as follows:

"(*f*) For every additional one hundred hectares or fraction thereof to the the first 100 hectares up to but not exceeding 1,000 hectares ..... ₱10.00

"(*g*) For every additional 200 hectares or fraction thereof to the first 1,000 hectares ..... ₱10.00

"(*h*) The fee for any case as herein provided shall not exceed ₱200."

3. This Order shall take effect on August 1, 1951.

FERNANDO LOPEZ
Secretary of Agriculture and Natural Resources

Recommended by:

FLORENCIO TAMESIS
Director of Forestry

Department of Public Works and Communications

RADIO CONTROL BOARD

DEPARTMENT ORDER NO. 82

July 5, 1951

AMENDMENTS TO SECTIONS 11, 12, AND 20 OF DEPARTMENT ORDER NO. 5 OF THE DEPARTMENT OF COMMERCE AND INDUSTRY PROMULGATING RULES AND REGULATIONS GOVERNING COMMERCIAL RADIO OPERATORS.

SECTION 1. Sections 11, 12, and 20 of Department Order No. 5 of the Department of Commerce and Industry, dated September 22, 1948 are hereby amended to read as follows:

"SEC. 11. *Passing grade.*—A passing average of 70 per cent of a possible 100 per cent is required on all elements of a written examination: *Provided,* That no rating shall be below 50 per cent in any element. An applicant who passes the written examination elements, but fails in the code tests may be given two chances to remove his deficiency within three months from the date he is advised of the result of his examination. Failure to remove the deficiency within the prescribed period shall invalidate the examination.

"SEC. 12. *Special provision.*—An applicant who fails in the examination for the class of license applied for may be granted a license of a lower class if he obtains a general average of at least 70 per cent on the elements required for that lower class.

"An applicant who qualifies in an examination, but fails to secure a license within one year from the date he is advised of the result of his or her examination, will not be issued a license without re-examination.

"SEC. 20. *Renewal of operator license without examination.*—All commercial operator

licenses may be renewed without examination: *Provided, that:*

(*a*) The applicant has had at least 90 days satisfactory service during the 6-month period prior to the date the application for renewal license is due to be filed, namely, 30 days prior to the expiration date, or

(*b*) The applicant has had at least 6 months satisfactory service during the term of the license prior to the date of the application for renewal license is due to be filed, and

(*c*) *Provided, further,* That holders of commercial radio operators licenses who are in the government service as radio operators may be exempted from renewing their licenses while in the government service as such radio operators and their licenses renewed upon separation from the government service, provided that a certificate of satisfactory service signed by their employers is presented together with the application for renewal license.

SEC. 2. All rules and regulations inconsistent herewith are hereby revoked.

SEC. 3. This Department Order shall take effect July 15, 1951.

SOTERO BALUYUT
Secretary

BUREAU OF TELECOMMUNICATIONS

ADMINISTRATIVE ORDER No. 2

January 26, 1951

EXEMPTION OF THE DEPARTMENT OF PUBLIC WORKS AND COMMUNICATIONS FROM PAYMENT OF RENTAL AND SERVICE CONNECTION CHARGES FOR TELEPHONES.

Effective as of December 1, 1950, the Department of Public Works and Communications is exempted from the payment of rental and service connection charges for the Government telephones installed in the different offices thereof.

F. CUADERNO
Director of Telecommunications

Approved:

SOTERO BALUYUT
Secretary of Public Works and Communications

ADMINISTRTIVE ORDER No. 3

July 9, 1951

CHARGES FOR RESIDENTIAL TELEPHONE FACILITIES

The following charge for residential telephone facilities is hereby prescribed, effective July 1, 1951:

Residential Telephone ..... ₱10 per month
(desk or wall type)

(The above rate will apply to telephones connected to residences of private individuals who are not government officials or employees but whose connection is necessary for the transaction of official business with any of the government instrumentalities. Telephones for this type of individuals, however, can only be connected subject to availability of existing cable and switchboard facilities near their place of residence.)

F. CUADERNO
Director of Telecommunications

Approved:

SOTERO BALUYUT
Secretary of Public Works and Communications

ADMINISTRATIVE ORDER No. 4

August 22, 1951

NOMINAL RATE OF ₱0.20 ON EACH OFFICIAL TELEGRAM OF THE NATIONAL BUREAU OF INVESTIGATION

Effective immediately, official telegrams of the National Bureau of Investigation shall be transmitted over the Bureau of Telecommunications electrical communication system at the nominal rate of ₱0.20 each.

Such telegrams shall carry the indicator NBI as the first word in the address which shall be included in the count. The usual number of words on each official telegram shall be written on the check indicator.

Such telegrams shall be paid at the time of filing.

F. CUADERNO
Director of Telecommunications

Approved:

SOTERO BALUYUT
Secretary of Public Works and Communications

Department of Commerce and Industry

SUGAR QUOTA ADMINISTRATION

PHILIPPINE SUGAR ORDER NO. 2 SERIES 1951-52

August 15, 1951

MILLING LICENSE FEES

Pursuant to the provisions of section 10 of Act No. 4166, and by virtue of Executive Order No. 118, Manila, September 16, 1937, as amended by Executive Order No. 210, dated June 23, 1939, it is hereby ordered that:

1. A temporary milling license will be issued subject to receipt from the mill company of satisfactory answers to the questionnaire attached to Field Service Instructions No. 1, series 1951-52 dated August 14, 1951, concerning the operations and stocks of the mill company.

2. Each mill company shall be temporarily licensed to manufacture for the 1951-52 crop year a quantity of centrifugal sugar as shown in the following list:

Mill district	A & B quota (In short tons)	License fee (pesos)
LUZON		
11—Calamba	53,773.807	₱2,700.00
13—Calumpit	5,839.396	300.00
16—Del Carmen	71,620.974	3,600.00
17—Don Pedro	51,599.175	2,600.00
18—El Real	5,554.131	300.00
29—Manaoag	5,954.171	300.00
30—Mindoro	1,829.738	100.00
31—Norte	5,666.093	300.00
34—Paniqui	10,342.547	500.00
35—Pasudeco	70,723.818	3,550.00
45—Tarlac	69,318.744	3,450.00
VISAYANS		
2—Asturias	24,100.354	1,200.00
3—Bacolod-Murcia	52,493.149	2,600.00
4—Bais	45,962.944	2,300.00
8-20—Binalbagan Isabela, Bearin, Palma & San Isilro	126,926.102	6,350.00
9—Bogo-Medellin-Cebu	19,620.202	₱1,000.00
15—Danao	12,272.073	600.00
19—Hawaiian-Philippine	67,075.650	3,350.00
22—La Carlota	93,190.238	4,650.00
24—Lopez	32,400.802	1,600.00
26—Ma-ao	50,849.004	2,550.00
32—Ormoc-Rosario	16,276.788	800.00
36—Pilar	23,308.086	1,150.00
38—San Carlos	42,110.342	2,100.00
40—Sta. Aniceta, Leonor, & Lourdes	11,654.721	600.00
42—Santos-Lopez & Janiuay	21,794.689	1,100.00
44—Talisay-Silay	53,163.153	2,650.00
46—Victorias-Manapla	120,195.259	6,000.00
Total	1,165,616.150	₱58,300.00

3. Applications for milling license shall be made in letter form to the Sugar Quota Administrator at a date prior to the commencement of milling operations for the 1951-52 crop. Such applications shall be accompanied by money order, draft, or certified check payable to the order of the Sugar Quota Administrator covering the license fee corresponding to the combined Mill District United States and Domestic allotments as set forth herein at the rate of ₱50 for every one thousand short tons or fraction thereof not less than five hundred short tons: *Provided, however*, that nothing in this Order shall be construed as denying the Sugar Quota Administrator the right to revise the license fee as may be required or authorized by law.

4. For a mill company which manufactures sugar in excess of its total A and B allotments as listed in Paragraph 2 of this Order, said mill company shall be charged an additional milling fee corresponding to the excess sugar manufactured.

V. G. BUNUAN
Administrator

Approved:

SATURNINO MENDINUETO
Under Secretary
Department of Commerce and Industry

APPOINTMENTS AND DESIGNATIONS

BY THE PRESIDENT OF THE PHILIPPINES

Municipal Officials

Celedonio Sevilla as Councilor of the municipality of Caloocan, Rizal, September 7.

Teodoro Cuartero as Mayor; and Fortunato Banog as Vice Mayor of the municipality of Rosario, Batangas, September 11.

Silverio Penonia as Councilor of the municipality of Sierra-Bullones, Bohol, September 18.

Clemente Abaya as Vice Mayor; Florentino Corales and Francisco Gadia as Councilors of the municipality of Candon, Ilocos Sur, September 18.

Arsenio Macarulay as Councilor of the municipality of Tanay, Rizal, September 20.

Catalino Medel as Vice Mayor; Ramon G. Marfori and Francisco Pagco as Councilors of the municipality of Calauan, Laguna, September 21.

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Geminiano Villarin and Leodegario Verceles as Councilors of the municipality of Binalonan, Pangasinan, September 21.

Felimon Juat as Vice Mayor of the municipality of Malabon, Rizal, September 22.

Leandro Ceopano as Vice Mayor; Mateo Malahay and Policarpio Bulado as Councilors of the municipality of Guihulngan, Negros Oriental, September 22.

Basilio Mansano as Vice Mayor and Restituto Maningas as Councilor of the municipality of Bongabon, Nueva Ecija, September 24.

Leoncio Rebong, Ramon Fernandez, and Jose Alingarog as Councilors of the municipality of Victoria, Laguna, September 25.

HISTORICAL PAPERS AND DOCUMENTS

President Elpidio Quirino issued the following comment on President Harry S. Truman's San Francisco address on September 4, 1951:

> "To peace-loving peoples throughout the world President Truman's speech is most heartening. It is an effective answer to totalitarian aggression stalking in our midst in the Pacific.
>
> "With the inclusion of Japan in the scheme of common defense, nothing can be more reassuring for the consolidation of an enduring peace in our part of the world. It is in this spirit that the Philippines signed the treaty of mutual defense with the United States a few days ago. It is in that same spirit that the Philippines, as I envisioned two years ago, would want to see forged in our area a pact which would bind all liberty-loving peoples to a defense of the common heritage against Communist aggression.
>
> "America has become a happy connecting link among ourselves. Once attained, the Pacific pact, with its concommitant spirit of mutual help and cooperation, will surely rebuild and strengthen the economic fabric of our respective countries, raise the standard of living of our peoples, and provide a new life of substance and contentment among a heretofore disorganized and neglected population of the world."

President Quirino's 35th monthly radio chat originally delivered and tape-recorded at the President's room in the Johns Hopkins Hospital, Baltimore, Maryland, U. S. A. Broadcast by all Philippine radio Stations, September 15, 1951:

Fellow Countrymen:

I cannot miss my monthly chat with you no matter where I am, precisely at this moment in our history when there is so much to talk about the future and the security of our nation.

During the last two weeks, four significant events have taken place in the United States. These have been epoch-making events not only for the Philippines but for Asia and for the world as a whole. On August 30, the treaty of mutual defense between the United States and the Philippines was signed in Washington. On September 1, a similar treaty was signed in San Francisco between the United States, Australia, and New Zealand. On September 8, the Allied Powers signed the peace treaty with Japan, thus terminating World War II. In the afternoon of the same day, the signing of the security pact between the United States and Japan was the last act in San Francisco, where six years ago, the United Nations was born to promote world peace.

You will look in vain in recent times for a similar ten-day period during which so much history was made. In periods of war and revolution, events that have shaken the world may have occurred in even more rapid succession, but the events that have taken place during a period of

ten days in Washington and in San Francisco were unprecedented in that they were entirely in the interest of peace.

Varied interpretations will be given to the real meaning of these historic international covenants. I consider it essential that our people, as lovers of peace, have a complete understanding and faithful interpretation of these treaties, affecting as they do our future and our security. For this purpose, we would perhaps need a great amount of broad-mindedness, vision, and nobility, but certainly more of the sense of reality and a genuine feeling of Christian peace.

Our gravest concern after we achieved our independence has been how to keep our political institutions stable and enduring. We cannot possibly enjoy our freedom and sovereignty without these basic prerequisites and we can only secure these prerequisites if our country is peaceful and relatively free from aggression.

We have made preparations not only for our internal security but for our national defense. To this end, we have entered into a military bases agreement and military assistance pact with the United States, in order to strengthen our economic structure, an indispensable requirement for our people's peace and contentment. We also made arrangements for mutually beneficial economic relations with the United States.

We have gone quite far in achieving these objectives, despite all odds and misgivings at home and abroad.

Our internal security has been greatly enhanced by the reorganization of our armed forces and our unabated campaign against the subverters of our government.

Our economic outlook has become more reassuring after a re-examination of our economic and financial structure with the aid of experts from the United States, now well-known as the Bell Mission, and with the implementation of our new program of total economic mobilization with the assistance of another United States agency, the Economic Cooperation Administration.

Our progress in these lines of endeavor in recent months has been so great that we can now say that a favorable atmosphere for our steady economic advance and political stability pervades the country.

But in view of the still unsettled world situation and the threats of aggression that may mar our greatest efforts and arrest the steady march of our country towards economic and external security, we immediately saw the imperative need of insuring our tranquillity of mind so that our people could concentrate their attention on the vast work of nation-building.

So, two years ago, we thought of providing for the creation of this feeling of security in our midst. We started it in the Senate of the United States in 1949 and followed it up in the Baguio Conference of 1950. But it was only two weeks ago that we could see the framework of that security laid in Washington and followed in San Francisco a week later.

Since the inauguration of our Republic five years ago, no public act has impressed or moved me more than the conclusion of the treaty of mutual defense with the United States of America. It was as if on the day of signing, as President Truman and I witnessed the new flowering of the historic friendship between the American and Filipino peoples, a heavy burden of fear had been lifted from Filipino shoulders and we could look to the future unafraid.

The signing of that treaty marked the culmination of fifty years of Philippine–American relations, beginning with the Philippine Revolution and the Spanish–American War down through the Jones Law and the Tydings-McDuffie Act, to the Pacific War and the grant of Philippine Independence.

We could well believe that the hand of destiny has moved with immutable logic within the framework of our just and legitimate national aspirations. The Philippine–United States mutual defense treaty has become the cornerstone of a system of collective security in the Pacific area, a system which, in the face of almost universal scepticism, we first advocated in 1949. I know that you, my fellow countrymen, must share with me the deep sense of gratification which we have a right to feel as we witness the speedy growth of an idea, the seed which we first planted early in the season. On this happy occasion, so rich in the possibilities of further achievement, I pledge anew from afar my whole strength and the policies of my administration to the enduring welfare and security of our country.

If the spirit of these recent events in the United States is translated into action, we shall have discouraged aggression, organized security and, what is more, at long last we shall have peace in the Pacific. For, what is the real meaning of the Washington and San Francisco performances but the formation of a veritable new union of the democracies for the preservation of world peace?

But these treaties for the Philippines have only started us on the road to peace, prosperity, and stability. We have yet to work and achieve these objectives. We cannot have peace without being at peace. Peace is not an abstract; it must be practiced. We must begin in our midst, in our own soil, in our homes, in our farms, in our factories.

The methods of peace are varied, but it is constructive peace that we need most; peace that produces, that gives contentment, that brings happiness, that guarantees individual security of life. We must endeavor to secure this kind of peace.

My fellow countrymen, with a voice that may scarcely reach you at this moment, but with all the force of a fervent prayer, may I renew my oft-repeated appeal that you all, whether in the city or in the outlying districts, in the mountain fastnesses or in the swamps, help accelerate the

clearing of our countrysides of the lawless elements and lead our country to a normal life of constructive peace.

In an epoch such as this our children cannot wish for more.

President Quirino, commenting on the speech of Governor Thomas Dewey before the American bar association convention in New York City on September 19 issued the following statement:

"We, in the Philippines, are deeply gratified by the growing interest of the American people in the development of a collective security system for the Pacific area, as it is in Asia and the Pacific that communist influence and dominion are more greatly feared.

"In the summer of 1949, in an address before the United States Senate, I took the liberty of suggesting that the United States take the initiative in the conclusion of a Pacific security pact analogous to the North Atlantic pact. That was nearly a year before the communist aggression in Korea.

"Today the growing menace of communism no longer leaves anyone in doubt as to the urgent need of taking prompt and effective action to combat that menace.

"The conclusion within a period of ten days of separate mutual defense treaties between the United States and the Philippines, Australia and New Zealand, and Japan is aimed at this objective.

"As far as the Philippines is concerned, we are satisfied that the mutual defense pact which we signed with the United States on August 30, 1951 contains all the guarantees we require for the security of our country. As a follow-up of the broader objective, however, I instructed my secretary of foreign affairs, General Carlos P. Romulo, to sound out the interested governments at the recent San Francisco conference. The report he has submitted is encouraging.

"If it is felt that a mutual defense alliance of the Pacific would, from the American point of view, afford greater overall security for the free world in that vital area, then the Philippine government would be ready to review the entire situation having due regard for the attitude of the other countries concerned, in particular toward the implications of the entry of Japan into the proposed collective security arrangement.

"Governor Dewey's speech is a bold projection in public of a revolutionary idea. Its greatest merit lies in the fact that his proposal is based on his actual observation of what we, in the Far East and in Southeast Asia are doing to fight communism.

"Referring to the unremitting warfare which the Philippines and other countries are waging within their own borders against communist treason and armed guerrillas, he aptly says that 'having seen it you cannot fail to gain a profound respect for those who are in the frontlines of freedom all over the Pacific.'

"The frontlines are indeed in the Pacific area and we in the Philippines are even now doing our part of the fighting both at home against the communist guerrillas and abroad against the communist aggressors in Korea.

"We believe that this is the kind of faith and self-help on which a United States-initiated plan for a Pacific collective security system must be built."

New York Governor Thomas Dewey's speech on September 19 before the American bar association in convention at the Waldorf Astoria hotel, demanding immediate formation of a Pacific defense alliance which is exactly what President Quirino has been continuously advocating since 1949, said in part:

"If we joined with the free nations of Asia as we have with those of Europe, we would have the majestic power of more than 800,000,000 persons armed in common defense. If the treaty should be successfully negotiated, America would be part of the most wonderful alliance on earth. With such tremendous might on the side of freedom, it would be more than any tyrant would ever dare attack."

President Quirino issued the following statement regarding his visit to Spain, shortly before boarding the *S.S. Constitution,* September 25, 1951:

"I leave for Spain in response to a gracious invitation by the government of that country. I consider such a visit opportune at this time in the interest of the foreign relations of my government and the good name of the Filipino people.

"Spain was our mother country for nearly four centuries. During that long period of time, she gave us of her many great cultural values and the blessings of her religion. These things we enjoy today, and it is not so easy to cast them aside. Spiritually we are linked to Spain and it is for us now to strengthen the link.

"I have come to the United States to witness the signing of a mutual defense pact between this country and mine. This pact settles the question of our security in our own area of the globe. Primarily, in a military way, my people should, from now on, have no fear of being attacked without the security of an adequate and effective defense.

"By virtue of the mutual defense pact, we have the United States definitely by our side, not only as a safeguard of the special ties of idealism that have bound us with the United States for nearly half a century, but precisely as the security that will give us that sense of mutual stability in a world harassed by distrust and suspicion.

"With our security within our immediate orbit assured as a result of our defense treaty with the United States, we want to preserve what remains of our ties with Europe the better to secure our place in the scheme of international harmony.

"Our foreign policy seeks the enhancement of our relations with other peoples of goodwill. It is in that spirit that I have accepted the invitation of the Spanish government. The Spanish people are deserving of our friendship in return for the abundantly demonstrated goodwill to us."

DECISIONS OF THE SUPREME COURT

[No. L–1720. March 4, 1950]

SIA SUAN and GAW CHIAO, petitioners, *vs.* RAMON ALCANTARA, respondent

1. VENDOR AND PURCHASER; MINOR; VALIDITY; CONSIDERATION NOT NECESSARILY CASH.—Under the doctrine laid down in the case of Mercado and Mercado *vs.* Espiritu (37 Phil., 215), herein followed, to bind a minor who represents himself to be of legal age, it is not necessary for his vendee to actually part with cash, as long as the contract is supported by a valid consideration. Preexisting indebtedness is a valid consideration which produces its full force and effect, in the absence of any other vice that may legally invalidate the sale.
2. ID.; ID.; ID.; ESTOPPEL; KNOWLEDGE OF VENDEE OF MINORITY THEREAFTER.—The circumstance that, about one month after the date of the conveyance, the appellee informed the appellants of his minority, is of no moment, because appellee's previous misrepresentation had already estopped him from disavowing the contract.

PETITION for review on certiorari a decision of the Court of Appeals.

The facts are stated in the opinion of the court.

Antonio Barredo for petitioners.
Zosimo D. Tanalega for respondents.

PARÁS, *J.:*

On August 3, 1931, a deed of sale was executed by Rufino Alcantara and his sons Damaso Alcantara and Ramon Alcantara conveying to Sia Suan five parcels of land. Ramon Alcantara was then 17 years, 10 months and 22 days old. On August 27, 1931, Gaw Chiao husband of Sia Suan received a letter from Francisco Alfonso, attorney of Ramon Alcantara, informing Gaw Chiao that Ramon Alcantara was a minor and accordingly disavowing the contract. After being contacted by Gaw Chiao, however, Ramon Alcantara executed an affidavit in the office of Jose Gomez, attorney of Gaw Chiao, wherein Ramon Alcantara ratified the deed of sale. On said occasion Ramon Alcantara received from Gaw Chiao the sum of ₱500. In the meantime, Sia Suan sold one of the lots to Nicolas Azores from whom Antonio Azores inherited the same.

On August 8, 1940, an action was instituted by Ramon Alcantara in the Court of First Instance of Laguna for the annulment of the deed of sale as regards his undivided share in the two parcels of land covered by certificates of title Nos. 751 and 752 of Laguna. Said action was against Sia Suan and her husband Gaw Chiao, Antonio Azores, Damaso Alcantara and Rufino Alcantara (the latter two being, respectively, the brother and father of

Ramon Alcantara). After trial, the Court of First Instance of Laguna absolved all the defendants. Ramon Alcantara appealed to the Court of Appeals which reversed the decision of the trial court, on the ground that the deed of sale is not binding against Ramon Alcantara in view of his minority on the date of its execution, and accordingly sentenced Sia Suan to pay to Ramon Alcantara the sum of ₱1,750, with legal interest from December 17, 1931, in lieu of his share in the lot sold to Antonio Azores (who was absolved from the complaint), and to reconvey to Ramon Alcantara an undivided one-fourth interest in the lot originally covered by certificate of title No. 752 of Laguna, plus the costs of the suit. From this judgment Sia Suan and Gaw Chiao have come to us on appeal by certiorari.

It is undeniable that the deed of sale signed by the appellee, Ramon Alcantara, on August 3, 1931, showed that he, like his co-signers (father and brother), was then of legal age. It is not pretended and there is nothing to indicate that the appellants did not believe and rely on such recital of fact. This conclusion is decisive and very obvious in the decision of the Court of Appeals. It is true that in the resolution on the motion for reconsideration, the Court of Appeals remarked that "The fact that when informed of appellant's minority, the appellees took no steps for nine years to protect their interest beyond requiring the appellant to execute a ratification of the sale while still a minor, strongly indicates that the appellees knew of his minority when the deed of sale was executed." But this feeble insinuation is sufficiently negatived by the following positive pronouncements of the Court of Appeals as well in said resolution as in the decision:

"As to the complaint that the defendant is guilty of laches, suffice it to say that *the appellees were informed of his minority within one (1) month after the transaction was completed.*" (Resolution.)

"Finally, the appellees were equally negligent in not taking any action to protect their interests *from and after August 27, 1931, when they were notified in writing of appellant's minority.*" (Resolution.)

"* * * The fact remains that *the appellees were advised within the month that appellant was a minor, through the letter of Attorney Alfonso (Exhibit 1)* informing appellees of his client's desire to disaffirm the contract * * *." Decision.)

"*The purchaser having been apprised of the incapacity of his vendor shortly after the contract was made,* the delay in bringing the action of annulment will not serve to bar it unless the period fixed by the statute of limitations expired before the filing of the complaint. * * *." (Decision.)

In support of the contention that the deed of sale is binding on the appellee, counsel for the appellants invokes the decision in Mercado and Mercado *vs.* Espiritu (37 Phil., 215), wherein this Court held:

"The courts, in their interpretation of the law, have laid down the rule that the sale of real estate, made by minors who pretend to be of legal age, when in fact they are not, is valid, and they will not be permitted to excuse themselves from the fulfillment of the obligations contracted by them, or to have them annulled in pursuance of the provisions of Law 6 title 19, of the 6th *Partida;* and the judgment that holds such a sale to be valid and absolves the purchaser from the complaint filed against him does not violate the laws relative to the sale of minors' property, nor the juridical rules established in consonance therewith. (Decisions of the Supreme Court of Spain, of April 27, 1840, July 11, 1868, and March 1, 1875.)"

The Court of Appeals has refused to apply this doctrine on the ground that the appellants did not actually pay any amount in cash to the appellee and therefore did not suffer any detriment by reason of the deed of sale, it being stipulated that the consideration therefor was a pre-existing indebtedness of appellee's father, Rufino Alcantara. We are of the opinion that the Court of Appeals erred. In the first place, in the case cited, the consideration for the sale consisted in greater part of a pre-existing obligation. In the second place, under the doctrine, to bind a minor who represents himself to be of legal age, it is not necessary for his vendee to actually part with cash, as long as the contract is supported by a valid consideration. Since appellee's conveyance to the appellants was admittedly for and in virtue of a pre-existing indebtedness (unquestionably a valid consideration), it should produce its full force and effect, in the absence of any other vice that may legally invalidate the same. It is not here claimed that the deed of sale is null and void on any ground other than the appellee's minority. Appellee's contract has become fully efficacious as a contract executed by parties with full legal capacity.

The circumstance that, about one month after the date of the conveyance, the appellee informed the appellants of his minority, is of no moment, because appellee's previous misrepresentation had already estopped him from disavowing the contract. Said belated information merely leads to the inference that the appellants in fact did not know that the appellee was a minor on the date of the contract, and somewhat emphasizes appellee's bad faith, when it is borne in mind that no sooner had he given said information than he ratified his deed of sale upon receiving from the appellants the sum of ₱500.

Counsel for the appellee argues that the appellants could not have been misled as to the real age of the appellee because they were free to make the necessary investigation. The suggestion, while perhaps practicable, is conspicuously unbusinesslike and beside the point, because the findings of the Court of Appeals do not show that the appellants knew or could have suspected appellee's minority.

The Court of Appeals seems to be of the opinion that the letter written by the appellee informing the appellants of his minority constituted an effective disaffirmance of the sale, and that although the choice to disaffirm will not by itself avoid the contract until the courts adjudge the agreement to be invalid, said notice shielded the appellee from laches and consequent estoppel. This position is untenable since the effect of estoppel in proper cases is unaffected by the promptness with which a notice to disaffirm is made.

The appealed decision of the Court of Appeals is hereby reversed and the appellants absolved from the complaint, with costs against the appellee, Ramon Alcantara. So ordered.

Ozaeta, Tuason, Montemayor, and *Torres, JJ.*, concur.

PADILLA, *J.*, concurring:

I concur in the result not upon the grounds stated in the majority opinion but for the following reasons: The deed of sale executed by Ramon Alcantara on 3 August 1931 conveying to Sia Suan five parcels of land is null and void insofar as the interest, share, or participation of Ramon Alcantara in the two parcels of land is concerned, because on the date of sale he was 17 years, 10 months and 22 days old only. Consent being one of the essential requisites for the execution of a valid contract, a minor, such as Ramon Alcantara was, could not give his consent thereto. The only misrepresentation as to his age, if any, was the statement appearing in the instrument that he was of age. On 27 August 1931, or 24 days after the deed was executed, Gaw Chiao, the husband of the vendee Sia Suan, was advised by Atty. Francisco Alfonso of the fact that his client Ramon Alcantara was a minor. The fact that the latter, for and in consideration of ₱500, executed an affidavit, whereby he ratified the deed of sale, is of no moment. He was still a minor. The majority opinion invokes the rule laid down in the case of Mercado et al. *vs.* Espiritu, 37 Phil., 215. The rule laid down by this Court in that case is based on three judgments rendered by the Supreme Court of Spain on 27 April 1860, 11 July 1868, and 1 March 1875. In these decisions the Supreme Court of Spain applied Law 6, Title 19, of the 6th *Partida* which expressly provides:

"Diziendo o otorgando el que fuesse menor, que era mayor de XXV años, si ouiesse persona que paresciesse de tal tiempo, si lo fase engañosamente, valdria el pleyto que assi fuere fecho con el, e non deue ser desatado despues, como quier que non era de edad quando lo fizo: esto es, porque las leyes ayudan a los engañados, e non a los engañadores. * * *" (Alcubilla, Códigos Antiguos de España, p. 613.)

The contract of sale involved in the case of Mercado *vs.* Espiritu, *supra,* was executed by the minors on 17 May 1910. The law in force on this last mentioned date was not *Las Siete Partidas,*[1] which was the law in force at the time the causes of action accrued in the cases decided by the Supreme Court of Spain referred to, but the Civil Code which took effect in the Philippines on 8 December 1889. As already stated, the Civil Code requires the consent of both parties for the valid execution of a contract (art. 1261, Civil Code). As a minor cannot give his consent, the contract made or executed by him has no validity and legal effect. There is no provision in the Civil Code similar to that of Law 6, Title 19, of the 6th *Partida* which is equivalent to the common law principle of estoppel. If there be an express provision in the Civil Code similar to Law 6, Title 19, of the 6th *Partida,* I would agree to the reasoning of the majority. The absence of such provision in the Civil Code is fatal to the validity of the contract executed by a minor. It would be illogical to uphold the validity of a contract on the ground of estoppel, because if the contract executed by a minor is null and void for lack of consent and produces no legal effect, how could such a minor be bound by misrepresentation about his age? If he could not be bound by a direct act, such as the execution of a deed of sale, how could he be bound by an indirect act, such as his misrepresentation as to his age? The rule laid down in Young *vs.* Tecson, 39 Off. Gaz., 953, in my opinion, is the correct one.

Nevertheless, as the action in this case was brought on 8 August 1940, the same was barred, because it was not brought within four (4) years after the minor had become of age, pursuant to article 1301 of the Civil Code. Ramon Alcantara became of age sometime in September 1934.

MORAN, *C. J.:*

I concur in this opinion of Mr. Justice Padilla.

BENGZON, *J.:*

I concur in the above opinion.

PABLO, *M.,* disidente:

No creo que Ramon Alcántara esté en estoppel al querer recuperar su participación en los lotes que él cedió a Sia Suan en la escritura de 3 de Agosto de 1931. Las circunstancias que concurrieron en su otorgamiento demostrarán que es insostenible esa conclusión. La acreedora era Sia Suan, y el deudor, Rufino Alcántara por transacciones que tuvo con ella en el negocio de copra. Al falle-

[1] The year 1251—Alcubilla, Códigos Antiguos de España, p. 196.

cimiento de la esposa de Rufino, alguien se habrá percatado de la dificultad de cobrar el crédito porque Rufino no tenía más que tres lotes de su exclusiva propiedad y dos lotes, como bienes gananciales. Ramon, uno de los herederos, era un menor de edad. Por eso, se procuró el otorgamiento de tal escritura, vendiendo el padre (Rufino) y sus dos hijos (Damaso y Ramon) cinco lotes amillarados en ₱19,592.85 por ₱2,500; que en realidad no fué más que una dación en pago de la deuda. Si no se otorgaba tal escritura, la acreedora tenía necesidad de utilizar un proceso largo de abintestado para obtener el pago de la deuda en cuanto afecte, si podía afectar, los bienes gananciales de Rufino Alcántara y su difunta esposa, o de tutela para que alguien actúe en lugar del menor Ramon. El procedimiento más corto y menos costoso entonces era hacer que el menor apareciera como con edad competente para otorgar la escritura de venta. Y así sucedió: se otorgó la escritura. El menor no recibió ni un solo céntimo. Con la herencia que había de recibir de su difunta madre, pagó la deuda de su padre.

Después de notificada Sia Suan de la reclamación de nulidad del documento, por gestión de Gaw Chiao, Ramon Alcántara siendo menor de edad aun, firmó un *affidavit* ratificando la venta en la oficina del abogado de Gaw Chiao. Esta actuación de Gaw Chiao, marido de Sia Suan, denuncia que no fué Ramon el que les hacía creer que era mayor de edad y que oficiosa y voluntariamente haya solicitado el otorgamiento de la escritura de venta. Si Gaw Chiao, marido de Sia Suan, fué el que gestionó el otorgamiento del *affidavit* de ratificación, por qué no debemos concluir que él fué quien gestionó a indicación tal vez de algún abogado, que Ramon Alcántara estampara su firma en la escritura de 3 de agosto de 1931? Pero la firma de un menor no vale nada; debía aparecer entonces que Ramon era de mayor edad. Por qué había de interesarse el menor en otorgar una escritura de venta de tales terrenos? No es más probable que la acreedora o su marido o algún agente haya sido el que se interesó por que Ramon tomara parte en el otorgamiento de la escritura?

Qué beneficio obtuvo el menor en el otorgamiento de la escritura? Nada; en cambio, la acreedora consiguió ser dueña de los cinco lotes a cambio de su crédito. Quedaba favorecido el menor al firmar su *affidavit* de ratificación? Tampoco; con todo, Sia Suan reclama que el menor fué quien la indujo a error. Si alguien engañó a alguien, no habrá sido Ramon. Tenía que ser la acreedora o alguien que ayudaba a ella en conseguir el pago del crédito; pero no fué, ni podía ser el menor.

Teniendo en cuenta todas estas circunstancias, no podemos concluir que Ramon Alcántara haya inducido a error a Sia Suan. No es aplicable, por tanto, la decisión de

este Tribunal en Mercado y Mercado contra Espíritu (37 Jur. Fil., 227); ni la del Tribunal Supremo de España, pues en tales casos, el menor fingió e hizo creer a los compradores que era mayor de edad: no era justo que el que indujo a los compradores a comprar un terreno desprendiéndose del precio de compra, sea permitido despues alegar su minoría de edad para anular la actuación hecha por él. Eso es verdadero *estoppel;* pero en el caso presente no le hay.

Laches es el otro fundamento sobre que descansa la mayoría para revocar la decisión apelada. *Laches* es medida de equidad, y no es aplicable al caso presente. Solamente debe admitirse como defensa cuando la aplicación estricta de la ley de prescripción, hace un daño irreparable y hay necesidad de hacer uso de la equidad. No debe aplicarse para fomentar una injusticia sino para minimizar sus efectos y solamente debe ser utilizada como defensa cuando en la aplicación de una ley se comete verdadera injusticia (30 C. J. S., 531). En el caso presente Ramon Alcántara tiene diez años de plazo a contar del 3 de Agosto de 1931, dentro del cual puede pedir la anulación de la venta. Y la demanda que inició esta causa se presentó dentro de ese plazo; no está prescrita pues aun la acción (art. 43, Cód. Proc. Civ.).

Suponiendo que Ramon Alcántara hubiera presentado su demanda antes de la venta de un lote a Nicolás Azores. Qué sentencia se hubiera dictado? El otorgamiento de una escritura de traspaso de una cuarta parte de los dos lotes; pero después de vendido un lote, se ordenaría, como decidió el Tribunal de Apelación, el traspaso de la cuarta parte del lote restante y el pago de la cuarta parte del importe en venta del lote vendido a Ramon. En uno y otro caso no se hace ningún daño a Sia Suan, solamente se le obliga a traspasar a Ramon la parte que, en herencia de los bienes gananciales dejados por su difunta madre, le corresponde. No hay daño desproporcionado que en equidad autorice a Sia Suan a invocar la defensa de *laches.* Si Sia Suan antes de la presentación de la demanda, hubiera construido edificios en los lotes por valor de ₱3,000,000, demos por caso, tal vez sería de equidad para Sia Suan invocar la defensa de *laches,* pues por el silencio de Ramon Alcántara, ella ha hecho mejoras de mucho valor que con una decisión semejante sería perjudicada. El traspaso a Ramon Alcántara de una cuarta parte de cada uno de los dos lotes pondría a ella en la alternativa de comprar esa cuarta parte de los lotes con precio excesivo o derribar parte de los edificios construidos. En el caso presente no se le ha puesto en esa difícil situación; al contrario, ella estuvo disfrutando de esos dos lotes sin hacer mejoras extraordinarias, y después de vendido el segundo lote, utilizó el dinero recibido, y no hay pruebas de que se haya

causado a ella daño por no presentarse la demanda más temprano.

Voto por la confirmación de la decisión del Tribunal de Apelación.

Judgment reversed.

[No. L–2038. March 4, 1950]

LUIS DEL CASTILLO, in his capacity as administrator of intestate estate of the deceased Andres Grimalt y Pastor, plaintiff and appellant, *vs.* METROPOLITAN INSURANCE COMPANY, defendant and appellee.

1. INSURANCE; LIABILITIES ASSUMED BY INSURERS; EXTRAORDINARY RISK DUE TO UNUSUAL CAUSES.—Insurance companies, generally, are willing to assume only ordinary risks or losses that may happen under ordinary conditions or in times of peace. Insurance companies are entitled to protect themselves and maintain their stability in the interest of the people whom they insure and accordingly they should avoid assuming extraordinary risks due to unusual and peculiarly destructive causes which are disproportionate to the amount of premiums paid. It is for this reason that extraordinary causes of loss for which no augmented premium has been paid are excluded from the coverage of the policies issued by the defendant company.
2. ID.; ID.; DAMAGES CAUSED BY FIRE DUE TO WAR OR INVASION.—When the property insured was destroyed by fire, the conditions in Manila were entirely abnormal on account of the war. Peace and order were beyond control for they were characterized by panic and confusion and accompanied by unchecked looting, uncontrolled mobs, and outbreaks of fire. Two-thirds of the population and two-thirds of the police force of the city had evacuated to the provinces, many houses were left without vigilance and were subject of general looting, and fire, in several instances, was the consequence because only a handful of policemen and Manila's firemen were left. Calls for assistance received no response from the fire department, so much so that the fire which destroyed the insured's property was the effect of abnormal conditions caused by war, of which the insurer is not liable.
3. ID.; LIMITATION OF ACTION, STIPULATION IN THE POLICY AS TO.—Failure of the insured to bring the proper action under the conditions and within the time stipulated in the policy, bars him from proceeding against the insurer.

APPEAL from a judgment of the Court of First Instance of Manila. Rodas, J.

The facts are stated in the opinion of the court.

Prudencio de Guzman for appellant.
Claro M. Recto for appellee.

MORAN, *C. J.:*

This is an appeal taken from a decision of the Court of First Instance of Manila absolving the defendant Metropolitan Insurance Company from the complaint filed

by Luis del Castillo as administrator of the estate of the deceased Andres Grimalt y Pastor.

According to the stipulation of facts submitted by the parties, the deceased Andres Grimalt y Pastor, was the owner of "Panadería la Magdalena" situated between O'Donnel and Misericordia streets in the City of Manila which was insured against fire and lightning and covered by Policies Nos. 21489, 21105 and 21106 issued by the Metropolitan Insurance Company which were in full force and effect at the time said property was partially destroyed by fire. Said policies have their face value of ₱15,000, ₱30,000, and ₱40,000 respectively and were worded identically there having been paid by the insured to the defendant company as premiums the amounts of ₱300 for Policy No. 21489, ₱600 for Policy No. 21105 and ₱800 for Policy No. 21106 for the period comprised between September 23, 1941, and September 23, 1942.

Paragraph 6 of each of these policies is as follows:

"This insurance does not cover any loss or damage which either in origin or extent is directly or indirectly, proximately or remotely, occasioned by or contributed to by any of the following occurrences, or which, either in origin or extent directly or indirectly, proximately or remotely, arises out of or in connection with any of such occurrences, namely:

"(1) Earthquake, volcanic eruption, typhoon, hurricane, tornado, cyclone, or other convulsion of nature or atmospheric disturbance.

"(2) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), mutiny, riot, civil commotion, insurrection, rebellion, revolution, conspiracy, military naval or usurped power, martial law or state of siege, or any of the events or causes which determine the proclamation or maintenance of martial law or state of siege.

"Any loss or damage happening during the existence of abnormal conditions (whether physical or otherwise), directly or indirectly, proximately or remotely, occasioned by or contributed to by or arising out of or in connection with any of the said occurrences shall be deemed to be loss or damage which is not covered by this insurance, except to the extent that the Insured shall prove that such loss or damage happened independently of the existence of such abnormal conditions.

"In any action, suit or other proceeding, where the Company alleges that by reason of the provisions of this condition any loss or damage is not covered by this insurance, the burden of proving that such loss or damage is covered shall be upon the Insured."

Early in the afternoon of January 2, 1942, a fire broke out in a grocery store owned by Yu Dian Chiang, then being looted, and caught and destroyed two doors of the "Panadería la Magdalena" building, thus causing a damage in the amount of ₱62,000.

The main issue here is whether or not the defendant, Metropolitan Insurance Company, is liable for the damage thus caused to the bakery above mentioned.

As above indicated, one of the conditions stipulated in the policies is that any loss or damage caused by war or invasion or "any loss or damage happening during the existence of abnormal conditions (whether physical or otherwise) directly or indirectly, proximately or remotely, occasioned by or contributed to by or arising out of or in connection with any of the said occurrences shall be deemed to be loss or damage which is not covered by this insurance" and that "where the company alleges that by reason of the provisions of this condition any loss or damage is not covered by this insurance, the burden of proving that such loss or damage is covered shall be upon the Insured."

Insurance companies, generally, are willing to assume only ordinary risks or losses that may happen under ordinary conditions or in times of peace. Insurance companies are entitled to protect themselves and maintain their stability in the interest of the people whom they insure and accordingly they should avoid assuming extraordinary risks due to unusual and peculiarly destructive causes which are disproportionate to the amount of premium paid. It is for this reason that extraordinary causes of loss for which no augmented premium has been paid are excluded from the coverage of the policies issued by the defendant company. (*See* Aetna Ins. Co. *vs.* Boom, 95 U. S., 117; 24 Law. ed., 395, 398; cited with approval in Woogmaster *vs.* Liverpool & London Globe Ins. Co., 45 N. E. [2d], 394, 396; Am. Mfg. Corp. *vs.* Nat. Union Fire Insurance Co., 14 So. [2d], 430, 438; Holmes *vs.* Employer's Liability Ass. Corp. Ltd. of London, Eng., 43 N. E. [2d], 746, 753.)

On January 2, 1942, when the bakery owned by plaintiff was destroyed partially by fire, the conditions in Manila were entirely abnormal on account of the war. In the stipulation of facts submitted by the parties, it is stated that in the City of Manila from December 29, 1941 up to January 3, 1942, due undoubtedly to the evacuation of the Philippine and U. S. Army and to the imminence of Japanese invasion, the conditions of peace and order were totally abnormal and beyond control for they were characterized by panic and confusion and accompanied by unchecked looting, uncontrolled mobs, and outbreaks of fire. From December 8, 1941 to January 4, 1942 there had been at least 50 fires in Manila and on January 2, 1942 there had been at least 8 fires in the city. And on January 6, a fire gutted the building opposite and directly in front of the bakery owned by plaintiff. Since 2/3 of the population and 2/3 of the police force of the city had evacuated to the provinces, many houses were left without vigilance and were the subject of general looting, and

fire, in several instances, was the consequence. Looting and robbery were rampant in the city because only a handful of policemen were left and they were generally ignored by the mob of looters. Fires breaking out in houses being looted were beyond control because a great portion of Manila's firemen had also evacuated to the provinces or failed to report for duty in fear of imminent danger and calls for assistance received no response from the fire department.

The fire which destroyed partially the bakery in question, came from a grocery that was being looted. Such fire was the effect of abnormal conditions caused by war.

There is another reason why plaintiff's action should be dismissed. In paragraph thirteen (13) of the policies it is stipulated that "if the claim is made and rejected and an action or suit be not commenced within twelve (12) months after such rejection * * * all benefit under this Policy shall be forfeited." According to the stipulation of facts, plaintiff's claim was rejected on February 1942, and yet the complaint in this case was filed on May 22, 1946. The action, therefore, is barred by the limitation agreed upon by the parties.

Judgment is affirmed with costs against appellant.

Ozaeta, Pablo, Bengzon, Padilla, Tuason, Reyes, and *Torres, JJ.,* concur.

Montemayor, J., concurs in the result.

MORAN, *C. J.:*

Mr. Justice Parás voted for affirmance.

Judgment affirmed.

[No. L-2171. Marzo 4, 1950]

EL PUEBLO DE FILIPINAS, querellante y apelado, *contra* IDE LAGON RAMOS, acusado y apelante

1. DERECHO PENAL; ROBO CON HOMICIDIO; PRUEBAS; IDENTIDAD PERSONAL DEL ACUSADO.—La identificación de la persona del acusado—es lo que importa y no su nombre—esta probada de una manera acabada, y su nombre, ya sea I. L. R. o A. L., jr., que puede cambiarse como lo estuvo haciendo, no desmerece su identidad personal.
2. ID.; ID.; ID.; BUENA CONDUCTA; DIPLOMA UNIVERSITARIO Y RIQUEZA DEL ACUSADO.—El diploma universitario y la riqueza no son patente de buena conducta; hay instruidos y ricos que son una bancarrota moral y hay pobres e iliteratos que son modelo de honradez.
3. ID.; ID.; ID.; COARTADA COMO DEFENSA.—Bajo las pruebas probadas en este asunto la defensa de coartada por el acusado no puede prevalecer contra la declaración positiva, clara y convincente del dueño de la casa en frente de la cual ocurrió el trágico suceso y la del policia C.

APELACIÓN contra una sentencia del Juzgado de Primera Instancia de Antique. Imperial Reyes, J.

Los hechos aparecen relacionados en la decisión del Tribunal.

Tobias Fornier en representación del apelante.

El Procurador General Auxiliar Sr. Guillermo E. Torres y *el Procurador Sr. Manuel Tomacruz* en representación del Gobierno.

PABLO, *M.:*

Por orden del Alcalde Municipal del municipio de Pandan, Antique, a eso de las cuatro de la tarde del 2 de Octubre de 1946, una patrulla compuesta del cabo Miguel Baron y tres policías municipales Flaviano Ambay, Valentin Condes y Epimaco Artiga, juntamente con el sargento Gerardo Maravilles y dos soldados de la policía militar, salió de la casa municipal para cumplimentar el mandamiento de arresto expedido contra Críspulo Saracaulao y Pedro Rufon y para comprobar el aviso del teniente del barrio de Libertad de que personas desconocidas y armadas estaban causando terror en su barrio. No llegó la patrulla a dicho lugar porque se detuvo en el barrio Bolanao para descansar y al mismo tiempo esperar a los dos soldados de la policía militar que se quedaron atrás. Como no llegaban, el policía Valentin Condes fué enviado para buscarles; pero al llegar cerca de la casa de Nepomuceno Napat, tres hombres le atraparon. Con sus esfuerzos consiguió desprenderse de ellos y se refugió en la casa, encontrando al dueño y cuatro personas armadas que eran el acusado y dos compañeros con *carbine* y el cuarto que estaba en el balcón con *sub-machine gun.* Después de apagar su sed bebiendo un vaso de agua, y no inspirándole confianza la sospechosa catadura de los cuatro hombres armados que hablaban en voz baja, el policía Condes suplicó a Nepomuceno Napat que le condujese a la casa de Tonio. Aquél se conformó. Apenas bajaban las escaleras, el acusado y sus tres compañeros siguieron en pos, y al llegar a los bajos de la casa el acusado dió un culatazo al policía Condes y acto seguido Billenas le dió otro. El acusado arrebató el *thompson* de Condes, ordenando a éste que subiera a la casa. Cumplió la orden, y apenas hubo llegado al tercer peldaño, el acusado descargó una andanada de tiros al policía Epimaco Artiga que entonces llegaba. Artiga cayó desplomado al suelo y Billenas se apoderó de su fusil. Inmediatamente el acusado y sus tres compañeros se marcharon con el botín. Los proyectiles hicieron blanco en el pecho de Epimaco Artiga, dos en el lado izquierdo y dos en el derecho, y por ellos murió inmediatamente. Valentin Condes, después de la salida del acusado y sus compañeros y repuesto del susto, volvió a la casa municipal de Pandan para dar cuenta del suceso.

Al día siguiente, el cadáver de Epimaco Artiga fué llevado al pueblo.

El acusado y sus tres compañeros subieron a la casa de Nepomuceno Napat en el barrio Bolanao, Pandan, a eso de las nueve de la noche haciendo creer al dueño que eran miembros de la policía militar, y en sus conversaciones informaron al dueño que el nombre del acusado es Ide Lagon Ramos y sus tres compañeros, Enrique Billenas, Dominador Dionela y Exequiel Sangeles. Accediendo a la petición de éstos, el dueño de la casa mandó a su muchacho preparar cena; pero no transcurrió aun mucho tiempo cuando llegó el policía Valentin Condes; quien, como ya se ha dicho, pidió a Nepomuceno Napat que le acompañase a la casa de Tonio. Nepomuceno y el policía Condes son los testigos de la acusación que declararon los hechos relatados.

El 30 de Octubre de 1946 se presentó la querella contra los cuatro hombres armados, acusándoseles del delito de robo con homicidio; tres no han sido arrestados aun, y el acusado-apelante Ide Lagon Ramos fué hallado en la carcel provincial de Iloílo sufriendo condena por posesión ilegal de armas de fuego. La comandancia provincial de Iloilo para poder cumplir las dos órdenes de arresto contra el acusado, por medio de la comandancia provincial de Antique en su endoso de 11 de Agosto de 1947, preguntó cuándo debía comparecer el acusado Ide Lagon Ramos ante el Juzgado de Paz de Pandan porque el mismo acusado tenía que comparecer por otra causa en el Juzgado de Paz de Hinigaran, Negros Occidental.

Con fecha primero de Septiembre de 1947, el acusado presentó un escrito renunciando a la investigación preliminar. Vista la causa, el acusado fué condenado por el Juzgado de Primera Instancia de Antique a la pena de reclusión perpetua, a indemnizar a los herederos de Epimaco Artiga en la suma de ₱2,000 con las accesorias y las costas.

Contra la sentencia, el acusado apela, y contiende que no ha sido debidamente identificado; que no se llama Ide Lagon Ramos sino Aurelio Lagon, Jr. Es inconsistente esta defensa con su escrito (página 16 del expediente) renunciando a la investigación preliminar en el cual usó el nombre Ide Lagon Ramos y la firma arrojada demuestra la espontaneidad y facilidad de los trazos, las cuales revelan que es su firma, usada con frecuencia. En sus cuatro escritos posteriores ya intentó firmar de diferente manera, haciendo vacilar la pluma para que los trazos no fuesen espontáneos. Todas estas cuatro firmas obrantes en las páginas 30, 37, 46 y 49 del expediente, denuncian el propósito que incubaba en su mente el acusado de utilizar la defensa de que no se llama Ide Lagon Ramos sino Aurelio Lagon, Jr.; pero desafortunadamente no se percató que

las firmas usadas no son "Aurelio Lagon, Jr." sino "Eddie Lagon Ramos": dos están con letras verticales y las otras dos con letras inclinadas hacia la parte derecha. Aun suponiendo que no se llame Ide Lagon Ramos sino Aurelio Lagon, Jr., eso no tiene importancia porque él hizo creer a Nepomuceno Napat, el dueño de la casa en que mandó preparar cena, que así se llamaba; en la carcel provincial de Iloilo se le conocía con tal nombre; se le arrestó bajo ese mismo nombre; en su moción renunciando a la investigación preliminar se daba por Idy Lagon Ramos, y estando ya en el Juzgado de Paz de Pandan, Antique, los testigos Nepomuceno Napat y policía Valentin Condes aseguraron que el acusado, bajo el nombre de Ide Lagon Ramos, fué el que dió culatazo al policía Condes y había arrebatado su fusil, y fué quien había disparado tiros al policía Artiga, matándole en el acto. La identificación de la persona del acusado—es lo que importa y no su nombre—está probada de una manera acabada, y su nombre, ya sea Ide Lagon Ramos o Aurelio Lagon, Jr., que puede cambiarse como lo estuvo haciendo, no desmerece su identidad personal.

La defensa contiende que el acusado es de Hinigaran, Negros Occidental; que sus padres poseen más de 60 hectáreas de terreno; y que es graduado en "Associate in Arts" en la universidad de Silliman. No hay razón—arguye la defensa—para que él, bajo tales circunstancias, vaya a Antique y se dedique al *gangsterismo*. El diploma universitario y la riqueza no son patente de buena conducta: hay instruidos y ricos que son una bancarrota moral y hay pobres e ileteratos que son modelo de honradez.

La defensa de coartada de que el acusado nunca había dejado Negros Occidental después de la guerra y que solamente por primera vez fué a Antique cuando fué llevado por los policías militares desde la carcel de Iloilo, no puede prevalecer contra la declaración positiva, clara y convincente del dueño de la casa en frente de la cual ocurrió el trágico suceso y la del policía Condes. (Pueblo *contra* Balneg y otro, 45 Off. Gaz., 2825; Pueblo *contra* Imson y otro, 45 Off. Gaz., 9th Supp., 3838.)

La defensa alega que la confesión del acusado de tres páginas no debe merecer ningún crédito porque ha sido obtenida por los policías militares bajo maltrato. Los alegados maltratos han sido desmentidos, y aun descartando esta confesión, las pruebas en autos demuestran fuera de toda duda la culpabilidad del acusado.

La defensa arguye que el acusado no puede ser condenado por el delito complejo de robo con homicidio citando el asunto de Estados Unidos *contra* Lahoylahoy (38 Jur. Fil., 351), lo que es inaplicable porque en el caso presente se probó, como se alegó en la querella, que los dos fusiles que estaban bajo la custodia de Valentin Condes y Epimaco

Artiga, como policías municipales, fueron arrebatados por el acusado y su compañero Billenas, en perjuicio del Gobierno. El apoderarse de los dos fusiles por medio de la fuerza ya descrita es robo. Y como con ocasión del robo mató a Artiga, el acusado cometió el delito complejo de robo con homicidio, con infracción del artículo 294, párrafo primero, del Código Penal Revisado.

Se confirma la sentencia impuesta al acusado con costas.

Moran, Pres., Ozaeta, Bengzon, Padilla, Tuason, Montemayor, Reyes, y *Torres, MM.,* están conformes.

Se confirma la sentencia.

[No. L-2407. March 4, 1950]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* MATIAS ALUPAY, defendant and appellant

1. CRIMINAL PROCEDURE, RULES OF; DELAY IN INSTITUTION OF PROSECUTION; JUSTIFICATION.—It would seem strange, almost unbelievable, that those persons who had witnessed the horrible killing of the old couple, and subsequently took the stand at the trial of this accused, should have kept this matter to themselves and refrained from imparting their knowledge of this gruesome affair to some reliable citizen or responsible official for appropriate action. But we take cognizance of the existence, during those days of the last war, of conditions so abnormal that the functions of government were, if any, under the control of the enemy occupant or someone who had the backing of force. And it is for this reason that, unless he was looking for trouble or was willing to endanger his personal safety, and perhaps his life, that discreet people refrained from airing their just grievances, particularly against those who had the upperhand in the community.
2. CRIMINAL LAW; MURDER; EVIDENCE; IDENTITY OF THE ACCUSED; MOON.—It has been shown that the moon had just appeared on the horizon when the accused killed his victims. Those witnesses could not, therefore, have been mistaken about the identity of the perpetrator of the crime.
3. ID.; ID.; ID.; ADMISSION; WARNING NOT TO REVEAL GIVEN BY ACCUSED.—The warning from the accused not to reveal to anyone that he had killed the old spouses, amounts to an admission of guilt, inasmuch as such warning was given immediately after the killing had taken place. By such warning he was trying to prevent his prosecution by sealing the mouths of the persons who had witnessed the commission of his crimes.
4. ID.; ID.; ID.; WITNESSES; CONTRADICTIONS AND INCONSISTENCIES OF TESTIMONY.—A witness has his own way of stating the facts as they are known to him and come to his perception. Inconsistencies and contradictions discovered in witnesses' testimony, rather than weakening the probative value of their testimonies, strengthened them, for if they should have given exactly identical statements, the defense would be justified in alleging that they have been reciting their lessons in court.

APPEAL from a judgment of the Court of First Instance of Ilocos Norte. Ramos, J.

The facts are stated in the opinion of the court.

Liberato P. Caday for appellant.

Assistant Solicitor General Guillermo E. Torres and *Solicitor Jose G. Bautista* for appellee.

PER CURIAM:

This is an appeal from a judgment of the Court of First Instance of Ilocos Norte which found Matias Alupay guilty of murder, under article 248 of the Revised Penal Code, and sentenced him to *reclusión perpetua*, to indemnify the heirs of the deceased, Timoteo Balbag and Maria Felicitas Agarpao, in the sum of ₱4,000 to the accessories of the law, and to pay the costs.

It appears from the evidence that in the latter part of November of the year 1944 when, following the landing of the U. S. forces in Leyte, the tide of the Japanese control over these Islands was ebbing, a supposed guerrilla unit, locally known as "Pilpilme," was operating in the mountains of Vintar and Bangui, Province of Ilocos Norte.

Matias Alupay, also known as "Apo Matias," was the local chief of the "Pilpilme," whose reputation for being responsible for the killing of people at the behest of its leaders had so impressed the barrio folks that Matias Alupay's commands were the law among the men under him.

About sunset, one day in November, 1944, Alupay, accompanied by three men, called at the houses of Pacifico Ravina and Ricardo Aldos, respectively, in barrio No. 6, Alao-ao, municipality of Vintar, Ilocos Norte, and under threat of death compelled them to join his organization as soldiers. In Paddaggan, Alupay instructed Pacifico Ravina and Ricardo Aldos to fetch from their house Timoteo Balbag and his wife Maria Felicitas Agarpao, on the pretext that the two victims shall accompany the group in going to Cabayu. Reluctantly the old spouses obeyed, joined the party and went on the winding mountain trail to Cabayu.

In the meantime Alupay had separated from the group to rejoin it later, accompanied by Rufo Balbag, son of the old man Timoteo. Upon reaching the *sitio* of Mabilag-Apinas, on the boundary line between Vintar and Bangui, Alupay, who was giving orders, commanded every one to halt. It was already midnight, and all the members of the party sat down, except Timoteo Balbag and Maria Felicitas Agarpao, who remained standing.

This appellant, who was carrying a long bolo, locally known as *calasiao,* stepping backward and uttering a cry of triumph and revenge, said to the old spouses "Now you have to die because you are proud and you prohibit us to use water of the ditch in our place." Then, suddenly, he hit Timoteo Balbag with his bolo at the right parietal region. Timoteo fell to the ground face downward, and

appellant, as if to satisfy himself that his victim will not rise again, with that bolo gave him another blow, this time on the back of the neck, below the occipital region. Then, he turned his attention to the old woman, by hacking her on the right side of the neck below the occipital region, and when as a consequence of that blow she fell sidewise, appellant gave another mortal thrust on her breast. After the killing of those victims, he ordered that the two corpses be removed and thrown into a ravine. This done, appellant warned everybody around him to keep mum about what they had just seen; he likewise commanded Rufo Balbag to return to Paddaggan, while the accused and the rest of his group proceeded to Cabayu arriving there at dawn, and on the following day returned to Paddagan.

It would seem strange, almost unbelievable, that those persons who had witnessed the horrible killing of the old couple, and subsequently took the stand at the trial of this accused, should have kept this matter to themselves and refrained from imparting their knowledge of this gruesome affair to some reliable citizen or responsible official for appropriate action. But we take cognizance of the existence, during those days of the last war, of conditions so abnormal that the functions of government were, if any, under the control of the enemy occupant or someone who had the backing of force. And it is for this reason that, unless he was looking for trouble or was willing to endanger his personal safety, and perhaps his life, that discreet people refrained from airing their just grievances, particularly against those who had the upperhand in the community. Thus, these eye-witnesses, who kept fresh in their minds the threats and warnings of the accused, dared not report to the proper officials, during those troublous days, the commission of the murders now under consideration; and it was only after liberation, when conditions of peace and order had improved, that, after the lapse of more than one year from the approximate day of their perpetration, Rufo Balbag, son of Timoteo Balbag, and Pacifico Ravina reported the killing to Esteban Garvida, chief of police of Bangui, Ilocos Norte.

On December 10, 1945, Alfonso Alcoba with Rufo Balbag and Juan Balbag, secured the written permission of the medical officer in charge of the sanitary division of Bangui, Ilocos Norte, to bring to town the remains of Timoteo Balbag and Maria Felicitas Agarpao from the ravine at Mabilag-Apinas, where they were dumped on orders of the accused in the latter part of November. Rufo Balbag found the bones of the old couple together with parts of the hat or *salakot*, Exhibit G, which was identified as the one woven by Juan Balbag and which his father Timoteo wore on that fateful night; a piece of leather, Exhibit H,

which was the holder of the container of a pipe and tobacco, which the deceased was using, was also found.

On the witness stand, Doctor Castillo of the sanitary division of the municipalities of Bangui, Burgos and Pasuquin, Ilocos Norte, identified the bones and referring particularly to the skulls Exhibits B and C, D to D–21 and two sets of bones, Exhibits E and F, respectively, said that they all belonged to human beings, that Exhibit B is the skull of a female person, while Exhibit C is that of a male individual. Examining the skull Exhibit C, *he* found an opening at the right side, on the parietal region, close to the right ear. He said that the fissure shows a traumatic wound caused by the use of a sharp-edged thin-bladed knife, for instance, a thin-bladed bolo.

It appears that during the days of the Japanese occupation, the deceased Timoteo Balbag as head man of the village was in charge of the distribution of water for irrigation purposes. Appellant felt that the water was not evenly distributed by Timoteo, that he was being discriminated against, that he should have been allotted a certain amount of water for the irrigation of his land. Matias Alupay who, in the meantime towards the end of the occupation period, had risen into power, and had become the chief of the "Pilpilme" in the locality, became angry at Timoteo and his grudge against the deceased reached a point when, on that fateful night, he avenged a fancied personal wrong by liquidating not only Timoteo but the latter's wife.

The defense did not deny that Timoteo Balbag and Maria Felicitas Agarpao were treacherously killed in the manner alleged in the information and described by the eye-witnesses for the prosecution. The clear narration made by those witnesses and the retrieval and expert identification of the bones of the victims, exhibited at the trial, and other personal belongings of Timoteo, constitute an overwhelming proof that they met violent death at the hands of the accused as contended by the prosecution.

In an endeavor to shift the blame to others, the defense tried to prove that Elias Pastor and Fernando Dais, of the "Pilpilme," had admitted responsibility for the killing of the spouses. It was alleged that Elias Pastor had reported to Lieutenant Escobar of the "Pilpilme" headquarters, that Timoteo Balbag and his wife were killed by them because the deceased would not evacuate nor put out their lights when they were told to do so.

But the testimonies of Rufo Balbag, Pacifico Ravina and Ricardo Aldos of the prosecution are so convincing, the details given by them of how Matias Alupay hacked the two old victims with his long bolo, that we have not the slightest doubt that this simple country people had no

base motives to falsify the truth to the extent of pinning on the appellant the commission of two capital offenses. As against the flimsy explanation allegedly given by Pastor that Timoteo Balbag and his wife were killed because they would not evacuate nor put out their lights, we have the strong and convincing motive which impelled this appellant to liquidate his victims, because he had sharply resented the attitude of Timoteo Balbag in denying him the use of irrigation water to which he—a man who became powerful in the community and had under his command the members of the "Pilpilme,"—believed himself entitled.

The presence at the scene of the crime of the prosecution witness Pacifico Ravina, had been admitted by the defense, and the only reason given why Ravina, Aldos and Balbag testified against this accused is that he had acted only as guide of the "Pilpilme." According to the evidence of the prosecution, he was not only a guide of the expedition on that fateful night, but he was the head of the same because he was giving orders to the others, and those government witnesses had seen and recognized him, and consistently pointed to him alone and to nobody else as the real and only perpetrator of the killing of Timoteo Balbag and Maria Felicitas Agarpao. It has been shown that the moon had just appeared on the horizon when the accused killed his victims. Those witnesses could not, therefore, have been mistaken about the identity of the perpetrator of the crime.

Again, the testimony of Ricardo Aldos that subsequent to the killing, Matias Alupay had given him stiff warning not to reveal to anyone that he had killed the old spouses, amounts to an admission of guilt, inasmuch as such warning was given immediately after the killing had taken place. By such warning he was trying to prevent his prosecution by sealing the mouths of the persons who had witnessed the commission of his crimes.

The efforts made by the defense to shift to others the responsibility for the killing of the spouses can deserve not the slightest consideration. To all appearances such persons are fictitious. The evidence of the defense failed to give any indication as to their identity, their residence and whereabouts; in fact, Pacifico Ravina of the prosecution, testifying in rebuttal, stated that he had never heard of such persons named Elias Pastor and Fernando Dais. In this connection, appellant has not made any effort to bring to the bar of justice those alleged killers, if he really knew their identity and whereabouts.

Finally, our attention is invited to alleged contradictions and inconsistencies discovered by the defense in the testimonies of the witnesses of the prosecution. We must

not lose sight of the fact that a witness has his own way of stating the facts as they are known to him and come to his perception. Such inconsistencies and contradictions, rather than weakening the probative value of their testimonies, strengthened them, for if they should have given exactly identical statements, the defense would be justified in alleging that they have been reciting their lessons in court. (People *vs.* Caballero, 53 Phil., 592; People *vs.* Limbo, 49 Phil., 94.)

Upon the above considerations, we have come to the conclusion that the guilt of this appellant as the perpetrator of the killing of Timoteo Balbag and his wife Maria Felicitas Agarpao, has been established beyond reasonable doubt, and that each killing, being qualified by the circumstance of treachery, constitutes one crime of murder defined and penalized in article 248 of the Revised Penal Code.

We note the attendance of the aggravating circumstances of the crimes having been committed in an uninhabited place, and that the victims of the offender being then 70 and 60 years old, respectively, when they were killed by him, is also another aggravating circumstance present in the commission of these offenses. We, however, disagree with the Solicitor General in taking into consideration in favor of the accused the circumstance of lack of instruction of the defendant. He was, as head of the "Pilpilme" in his community, a powerful man whose commands were obeyed by those under him and it cannot, therefore, be justly alleged that he was an ignorant man.

By unanimous vote of all the justices present in the consideration of this case, it, therefore, becomes our painful duty to modify the judgment of the lower court by imposing upon appellant the penalty of death, which shall be carried out and executed in acordance with the provisions of articles 81 and 82 of the Revised Penal Code, on a day to be fixed by the trial court, within thirty days after the return of the record of the case to the said court. With costs.

Moran, C. J., Ozaeta, Pablo Bengzon, Padilla, Tuason, Montemayor, Reyes, and *Torres, JJ.*

MORAN, *C. J.:*

Mr. Justice Parás voted for the modification of the judgment appealed from, and the imposition of the death penalty on this appellant, but, on account of his being on leave at the time of the promulgation of this opinion, his signature does not appear herein.

Judgment modified, death penalty imposed.

[No. L-2447. March 4, 1950]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* PEDRO PULIDO ET AL., defendants. PEDRO PULIDO, IRINEO BOÑGOG and TITO T. QUINTO, appellants.

1. CRIMINAL LAW; ROBBERY WITH HOMICIDE COMMITTED BY A BAND; EVIDENCE; CONFESSION, WHEN COMPETENT AND ADMISSIBLE.—When the evidence clearly shows that the written statements made by the accused were given voluntarily without undue pressure and without any promise of clemency or reward, that they contain so many details that could have been known only to the three appellants but which was difficult or even impossible for the military police to invent and include therein, notwithstanding appellants' claim that said statements were given under duress and to avoid further torture by the military police, said statements are competent and admissible evidence.

2. ID.; ID.; EVIDENT PREMEDITATION AS INHERENT IN ROBBERY.—Evident premeditation is inherent in the crime of robbery. So to warrant a finding of the attendance of this aggravating circumstance in the complex crime of robbery with homicide, it must be linked with and considered with the killing.

3. ID.; ID.; TREACHERY AS AGGRAVATING CIRCUMSTANCE.—The sudden and unexpected attack with firearms resulting in the death of the unsuspecting and helpless victims constituted treachery.

4. ID.; ID.; AGGRAVATING CIRCUMSTANCE OF CRAFT.—The commission of the crime is attended by the aggravating circumstance of craft when the victims were lured into going to Doñgon bridge which at the time was an isolated spot because it was the end of the road and no one would or could pass there because of the blasted condition of the southern end thereof.

5. ID.; ID.; COMMITTED IN AN UNINHABITED PLACE.—When the nearest house to the bridge, the place of the commission of the crime was about 200 yards away up the mountain side and the said bridge was not accessible because of the trees and other vegetation that stood between said house and the bridge, to say nothing of the rough terrain and that said bridge was not visible from the house, it is obvious that the bridge was purposely sought and chosen by the appellants in order to avoid detection of the crime and preclude any interference with its commission or any help to the victims.

6. ID.; ID.; PENALTY; ACCUSED AT THE COMMISSION OF THE CRIME WAS BELOW 18 YEARS.—When an accused at the time of the commission of the crime is less than eighteen, the court has to apply the provisions of article 68, paragraph 2 of the Revised Penal Code.

APPEAL from a judgment of the Court of First Instance of Pangasinan. De los Santos, J.

The facts are stated in the opinion of the court.

Ferdinand E. Marcos and *Jose L. Africa* for appellant Quinto.

Resurreccion & Astudillo for other appellants.

Solicitor General Felix Bautista Angelo and *Assistant Solicitor General Francisco Carreon* for appellee.

PER CURIAM:

Those who go up to Baguio by car may remember or may be familiar with that stretch of road between the town of Sison and the beginning of the Kennon road that goes up to Baguio, near the Kennon bridge. For several hundred meters, this road follows the contour of and hugs the mountains to the right, while to the left is the Bued river, wide but shallow, part of whose bed is dry during the summer months. On this highway is to be found the concrete Doñgon bridge, scene of the ghastly crime involved in this case.

At the beginning of the Pacific War, and when the Japanese landed on Northern Luzon, in their retreat toward Bataan, the USAFFE forces blasted the southern end of this bridge which then became impassable until repaired about the end of 1947, or about the beginning of 1948. In the meantime, people driving up to Baguio from Sison, at a point still far from said bridge, had to make a detour to the left until they reached the road running from Rosario to Baguio, then turned to the right, crossed the Kennon bridge and then turned to the left to go up Kennon road toward the Summer Capital. So, the Doñgon bridge became an isolated spot. This explanation is deemed necessary in order to understand the sketch (Exhibit O), trace the route taken by the parties involved in this case, from the barrio of Artacho, Sison, Pangasinan to Doñgon bridge on the afternoon of June 12, 1947, as well as establish the nature of said bridge as a secluded and uninhabited place. Late that afternoon, two women and four men accompanied by one of the appellants and conspirators, named Irineo Boñgog, all riding in one jeep, were lured into and held up on this Doñgon bridge. Three of them were killed by gunfire and then despoiled of their belongings, principally money amounting to ₱33,000. Later about midnight Boñgog, because he was not given his share of the loot, and apparently to simulate innocence, reported the hold up and killing to the police in Sison, but without revealing the identity of the robbers and killers, much less, his connection with the conspiracy.

Very early the next day, police authorities from Sison went to Doñgon bridge where a most gruesome spectacle met their eyes. On the bridge itself was a burned jeep and under it was the charred body of a man who later was identified as Federico Sarmiento. Behind the jeep toward the north and on the left enbankment of the road was the dead body of Margarita Surisantos Maneclang and further north below the embankment or rather on a dry portion of the bed of the river was the dead body of Leonor Calderon. The three bodies bore several mortal bullet wounds. The nearest house to the scene of the killing was about 200 meters away up the mountain side to the right. All

these details are graphically shown on the sketch (Exhibit O).

As a result of the investigation of the police authorities, Irineo Boñgog was suspected as forming part of the gang that effected the hold up and the killing and so was detained. Pedro Pulido and Crestituto Quinto, *alias* Tito Quinto, were later arrested. Pulido was taken to Doñgon bridge where in the presence of Captain Hidalgo and Lieutenant Perez and two soldiers, all of the Military Police, he re-enacted the hold up and shooting which resulted in the killing and robbery of the three victims. Still later, Delfin Gomez and Nicasio Magdaraog were arrested. During their confinement and investigation by the Military Police in Dagupan, prisoners Quinto, Boñgog and Pulido signed and ratified before the justice of the peace of Dagupan, three statements (Exhibits G, H, and I), respectively. The five prisoners, and Benjamin Esuagen *alias* Ben and Santiago Sipos *alias* Ago both of whom have never been arrested, were charged with multiple murder before the justice of the peace court of Sison, which court after proper proceedings sent the case up to the Court of First Instance of Pangasinan where the provincial fiscal changed the charge to robbery in band with multiple homicide. This new complaint was preliminarily investigated by the justice of the peace of the capital of the province who later elevated the case to the court of first instance. In that court, the complaint was further amended, dropping Esuagen and Sipos as defendants for the reason that they were still at large. Before the trial, upon the recommendation of the prosecuting attorney, Delfin Gomez was discharged from the information in order to utilize him as a Government witness.

After trial the lower court presided over by Judge Ceferino de los Santos acquitted Nicasio Magdaraog, but "declared, the defendants Pedro Pulido, Ireneo Boñgog, and Tito Quinto guilty as principals beyond reasonable doubt of the crime with which they are charged in the information and imposes upon them the penalty of death by electrocution; to return or pay, jointly and severally, the amount of ₱22,000 to the heirs of Margarita Surisantos Maneclang, and the sum of ₱11,000 to the heirs of Federico Sarmiento; to indemnify, jointly and severally, the heirs of each of the victims Margarita Surisantos Maneclang, Leonor Calderon, and Federico Sarmiento in the sum of ₱8,000 for each victim; and, to pay three-fourths of the costs." This case is now here for review.

Piecing the different pieces of the evidence consisting of the testimonies of the witnesses for the prosecution and the defense, the written statements or admissions made by the appellants and the other exhibitis, like we do in a cross word puzzle, the resulting picture may be described briefly as follows.

With the establishment of the American Military and Naval Bases in the Philippines after liberation, particularly in Northern Luzon, such as Base M in San Fernando, La Union and the munitions dump at Rosario, same province, through pilferage, sometimes, with the active connivance of the persons in charge thereof as well as those detailed to guard the same, explosives, such as dynamite and blasting caps, in large quantities were channeled from said bases into the hands of civilians, especially fishermen who used them to illegally catch fish in rivers, particularly in Lingayen Gulf, there developed an illegal traffic in this prohibited commodity on a more or less large scale, and the business of "buy and sell" with its inevitable agents and middlemen, with which we have become familiar during the Japanese occupation flourished anew, but with an innovation or added factor. There sprang groups of people who because of lack of capital could not engage in the business, or, spurning the illegal, the profitable traffic in this prohibited article as being too slow or its profits as insufficient, found and developed a shortcut or easier way of making money by pretending to have dynamite or blasting caps, luring prospective buyers to a lonely spot and robbing them of the purchase money carried by them, even killing them in order to eliminate all chances of detection thru witnesses. This was exactly what happened in the present case. The three appellants in this case—Pulido, Bonĝog, and Quinto and their associates Esuagen and Sipos, were engaged in this highly profitable but infamous business or racket off and on during 1947.

About June 10 of the same year, these five men met in the barrio of Artacho, town of Sison, and decided to renew or to give more impetus to their slackening business. Pulido, Bonĝog, and Quinto were designated to look for prospective buyers of blasting caps. That same day, the three met Delfin Gomez who was passing by the barrio of Artacho, Sison on his way to his town, Sual, Pangasinan. Bonĝog who was acting as spokesman for the three asked him if he was interested in blasting caps. Gomez who saw profit in the business said that he would look for buyers, and to assure a reasonable margin of profit for himself, he bargained and succeeded in having the price of ₱8,000 a box reduced to ₱7,500. In the afternoon Gomez accompanied by Bonĝog went to Dagupan and contacted Leonor Calderon, an agent who also promised to look for blasting cap buyers. After staying in her house Gomez and Bonĝog returned to Artacho, Sison, in the morning of the 12th with the assurance of Leonor that later she would follow them with a buyer. True enough, that same morning Leonor arrived at Artacho, accompanied by a buyer, Margarita Surisantos Maneclang who had with her ₱22,000 in bills, some of which were in large denominations.

In the meantime, and independent of and alien to the plan and measures made and taken by the three accused and their associates, Nicasio Magdaraog acting as an agent on his own, had been trying to interest Federico Sarmiento of Urdaneta, Pangasinan in the purchase of No. 7 blasting caps. But Sarmiento was interested only in No. 10 blasting caps. In going to the town of Rosario where the military munitions dump was located looking for No. 10 blasting caps, Magdaraog accompanied by Jesus Ostrea, cousin-in-law of Sarmiento, met Leonor Calderon and learned from her that Boñgog and his associates had plenty of blasting caps for sale, apparently the kind wanted by Sarmiento. Ostrea was dispatched to Urdaneta to call his cousin-in-law. Later that afternoon of June 12, 1947, Ostrea arrived at Artacho accompanied by Sarmiento who brought with him ₱11,000, with which to buy blasting caps. Pulido who seems to be, if not the mastermind, at least the most active member of the gang, told the prospective buyers that he had five cases of blasting caps but which he dared not bring or show in public because of their prohibited nature. At the beginning, Leonor and Margarita were insisting that they be shown samples of the blasting caps before they would seriously consider the purchase thereof. Pulido, pretending to secure samples, left but later returned saying that he did not succeed in his mission for the reason that the Military Police were confiscating blasting caps and furthermore, his uncle who was really the owner of the blasting caps refused to open any of the boxes in order to get samples therefrom. Magdaraog showed some impatience and said that as long as Pulido and his companions had the stock for sale, they could very well dispense with seeing samples thereof. The parties—the buyers Sarmiento and Margarita and their agents Magdaraog and Delfin Gomez and Leonor, on one side, and the accused represented by Pulido, on the other, finally closed the deal. Pulido left them ostensibly to secure the mythical five cases of blasting caps and place them at the disposal of the buyers at a secluded spot secure from the eyes of the Military Police. He instructed the buyers to follow later and go to Doñgon bridge and once there, call out his name Pedro. His associate Boñgog was detailed to accompany the purchasers. Pulido had gone to make the final arrangements and put the finishing touches to their dastardly scheme. He rounded up his companions Quinto, Esuagen, and Sipos and took them to Doñgon bridge to await the arrival of their victims. Pulido and Quinto were provided with a carbine and a garand rifle, respectively, while Sipos carried a Thompson Submachine gun.

About 6 o'clock that afternoon the party of purchasers left Artacho, Sison, in a jeep bound for Doñgon bridge. Sarmiento was at the wheel. To his right were the two

women—Margarita and Leonor, and at the extreme end of the front seat was Nicasio Magdaraog. Seated on the back seat were Jesus Ostrea on the left and to his right was Gomez. On the right tool box was seated Bonggog.

As stated at the beginning of this decision, the party could not take the direct road straight to Donggon bridge because the road from Artacho to that bridge was impassaable; and so they went around to the left until they reached the road from Rosario to Kennon road, turned to the right and crossed the Kennon bridge. To apprise drivers of other vehicles who may be coming from the opposite direction, Sarmiento snapped on his headlights but after leaving the bridge and turning to the right toward Donggon bridge, he put out his lights and continued driving up to their destination. On reaching Donggon bridge, the party saw that a large branch of an acacia tree, with fresh leaves, had been placed across the southern end of the bridge so as to bar any further advance of the vehicle. This, aside from the fact as already stated that the southern end of the bridge had been blasted. Sarmiento got down from the jeep and walked forward presumably to see or investigate the condition of the blasted end of the bridge and to look more closely at the acacia branch laid across it. In order to give way to Bonggog, who went down the jeep in order to give the signal, Magdaraog had to go down first but later it seems that he returned to his seat. Bonggog walked forward about seven meters in front of the jeep and called out the name of Pedro about twice. Almost immediately thereafter, a burst of fire from at least two guns greeted the party. Sarmiento visibly hit, held up his hands and retreated but the firing continued and he fell to the ground dead. Magdaraog got down from the jeep in a hurry and ran northward and was able to escape. The two women also jumped down from the jeep and scurried northward behind the vehicle in a crouching position either to avoid the continuous fire or because they had already been hit. Delfin Gomez before and in the act of jumping down from the jeep and attracted by source of the fire, distinctly saw Pulido in a kneeling position in front of the jeep and about six meters away firing a gun in the direction of the jeep. Three meters behind him was Quinto also firing a long gun whom Gomez also saw and identified. Jesus Ostrea told the court that he also saw Pulido firing a gun in the position already described but although he saw a man behind him also in the act of firing, he could not identify said person. Both Gomez and Ostrea, running northward and away from their assailants were able to escape by jumping off the road into the ravine and later making for the mountains. During their flight they both saw the two women crouching and crawling away from the jeep.

Thereafter, Pulido, Quinto, Boñgog, Esuagen and Sipos searched and robbed their three dead victims—Sarmiento, Leonor and Margarita. Esuagen lifted the body of Sarmiento, placed it under the jeep and then set fire to the vehicle. The bodies of the two women were flung down the embankment.

The defense of *alibi* interposed by appellants Pulido and Quinto was correctly rejected by the trial court on the ground that even assuming that they were really at the places where they claim to have been that afternoon of June 12, 1947, they could well and easily have gone to the scene of the crime to commit it. Moreover, although Pulido claims that that afternoon he had borrowed a horse from a friend and ridden it in search of an astray cow, a disinterested witness for the prosecution, who lived not very far from Doñgon bridge, told the court that shortly before 6:30 that afternoon he had seen Pulido and Quinto riding on a horse pass near his house.

Boñgog, one of the appellants herein, naturally, could not put up the same defense of *alibi* for the reason that he was riding in the same jeep with the persons who were held up and killed by his co-defendants. But he insists that he merely went to accompany the party that was supposed to buy blasting caps from Pulido and his companions at Doñgon bridge. There are several reasons for believing and finding Boñgog as having taken part in the conspiracy, at least to rob the victims if not also to kill them. When Boñgog, Pulido, and Quinto tried and succeeded in interesting Delfin Gomez in the purchase of blasting caps on June 10, 1947, it was he (Boñgog) who acted as spokesman for the trio. In fact he accompanied Gomez to Dagupan to look for prospective buyers, and that fateful afternoon of June 12th, it was he who accompanied and acted as a guide to the party of agents and buyers, and, what is more important, upon their arrival at Doñgon bridge, it was he who gave the signal for the hold up and, possibly, also for the firing, by calling out the name of Pedro Pulido twice. If he were an innocent party, merely asked to accompany the purchasers, without any understanding or connivance with the robbers and killers, he could very well have called out the name Pedro Pulido from his seat inside the jeep, but that would have imperiled his life because at the start of the shooting the assailant's fire was mostly concentrated on the jeep and its occupants. So, he had to get down from the vehicle which he did. Furthermore, the fact that in spite of the intense firing from Pulido, Quinto and Sipos, Boñgog received not even a scratch, while Sarmiento who had also gotten down from the jeep and walked forward and was standing not far from him, was hit, showed that the firing was not intended for him, and that it was purposely

withheld until he had negotiated a sufficient and safe distance from the jeep and its passengers. Moreover, his written statement (Exhibit H), definitely links him with the conspiracy.

In this connection, we shall have to rule upon the admissibility and competence of the three written statements (Exhibits G, H, and I) of Quinto, Bonĝog and Pulido, respectively, for the reason that the three appellants claim that said statements were given under duress and to avoid further torture by the military police. We have carefully examined the evidence on this point and we are convinced that all the three statements were given voluntarily without undue pressure and without any promise of clemency or reward. With the exception of Pulido, the defendants were unable and failed to show either to the trial court or to the provincial fiscal or the justice of the peace, anything on their persons showing any sign or trace of any torture or maltreatment. When they appeared before justice of the peace Hermitaño to sign and ratify their statements they made no complaints or remark in this regard. It is true that at the trial Pulido, alleging manhandling, showed a scar on his forehead, but it was satisfactorily explained by Captain Hidalgo and Lieutenant Perez to the court. According to them, one day upon returning to Dagupan from Donĝon bridge where Pulido had re-enacted the commission of the crime, they were overtaken by a six by six truck and Pulido who was in their jeep and under custody, jumped from it, almost right in the path of the truck, either to commit suicide or to escape. Fortunately, the wheels of the truck missed him by a matter of inches. The two military police privates guarding him in the jeep jumped down and handled him rather roughly believing that he was trying to escape, and the wound on his forehead may have been caused by said rough handling or by his rolling over and along the road after he jumped from the running jeep.

It is noteworthy that in none of the three statements (Exhibits G, H, and I) did the affiants admit having taken part in the killing. Bonĝog, although admitting having taken part in the conspiracy, limited the object thereof to merely holding up the victims and not to inflict any injuries, much less kill them. Pulido and Quinto, although admitting having carried a carbine and a Garand rifle, respectively, said that they did not take any part whatsoever in the killing because although he (Pulido) pressed the trigger of his carbine three times, it did not fire; and as to Quinto, he said that his Garand rifle was snatched away from him by Ben Suagen. If there had really been undue pressure, intimidation, or torture by the Military Police to the extent that the three affiants no longer had a will of their own and merely followed whatever the police wanted and indicated, to insure conviction for the killing of the

victims, it would have been easy and convenient to have included in the three affidavits admissions and statements of a conspiracy not only to rob but also to kill, even actual participation in the actual killing. But this was not done. Besides, the affidavits contain so many details that could have been known only to the three appellants but which was difficult or even impossible for the Military Police to invent and include in the affidavits. Another consideration which should not be overlooked is that although Delfin Gomez and Nicasio Magdaraog were strongly suspected by the Military Police as being members of the conspiracy and were in fact arrested and held by the Military Police, to say nothing of their being included in the complaint or information, unlike the three appellants, these two did not subscribe any affidavit linking themselves with the conspiracy. All these circumstances persuade and convince us that the three statements (Exhibits G, H, and I) were made voluntarily and are competent and admissible evidence.

The fact that Boñgog reported the robbery to the police authorities of Sison, may at first blush appear perplexing if not intriguing, and his counsel seizes upon this circumstance to bolster his argument that Boñgog would not have done this if he were really guilty. Of course, the perpetrators of a crime, especially one as hideous as that we have under consideration, do not usually report the matter to the authorities just to be arrested and punished, unless they have a good defense, such as self-defense in a crime of homicide or physical injuries. But as the trial court has well observed, Boñgog may have made the report in order to divert suspicion and lead the authorities to believe that since he reported the crime, he could not have possibly have taken part in it. Another explanation which the record reveals is that Boñgog, despite his connection with the conspiracy and his active participation in executing and carrying it out, was, according to him omitted in the apportionment of the loot, this, altho he knew that there was much of it. Furthermore, in making the report to the police of Sison, he was careful in excluding himself from any connection with or participation in the commission of the crime. He pictured himself as an innocent passenger in the jeep, merely requested by the two women victims to accompany them and act as their guide. To his simple mind, at the time, in making the report he was leading the authorities away from his trail because he made himself appear as a mere innocent bystander, but at the same time getting even with his co-conspirators who had double-crossed him.

As to the identification of Pulido and Quinto, we are satisfied that the two were seen and sufficiently identified by Gomez while he was seated in the jeep and while jumping down from it to flee from the firing. According to him,

Pulido was not more than six meters away from the jeep at the time, while Quinto was only about three meters behind Pulido, both in the act of firing their guns. Ostrea who was sitting beside Gomez on the back seat also saw these two men in the act of firing. He could identify Pulido, but not the man behind him. The fact that Ostrea did not identify Quinto, although he could have done so without much fear of contradiction, speaks well for his sincerity and truthfulness.

As to whether at the time of the hold up and shooting, it was still clear and bright for one to see and identify a person several meters away, the evidence reveals that at about 6.30 p. m. that month of June, although the sun may have been setting or may have even set, it was still bright. It will be remembered that in driving from Kennon bridge southward the Dongon bridge, Sarmiento did not use the lights of the jeep, showing that there was sufficient light from the sun either direct or reflected from the sky, to permit safe driving over a mountain road.

It is true, of course, that at the time the three deceased were engaged or were engaging in illegal traffic, trying to buy a prohibited article. They were not exactly innocent, law-abiding citizens. At the same time their open, even habitual disregard of the law could not in any way minimize the enormity or much less justify this cold-blooded slaughter. There was absolutely no necessity or reason for the killing, at least from the standpoint of a successful execution of the plan of robbery. It was not necessary to fire a single shot to bring the jeep to a stop because it was already at a standstill, and besides, its further progress was blocked not only by the acacia branch purposely laid across the bridge but also by the blasted condition of the southern end of the said bridge. There was no necessity for killing the victims because surprised and caught unawares, in all probability, they would not and could not have offered any resistance against Pulido, Quinto, Esuagen and Sipos, three of whom were armed with automatic weapons. This, aside from the fact that Ireneo Bongog, a co-conspirator was armed with a revolver and in case of resistance by the victims would assuredly, have helped his co-conspirators. The only conceivable object for the massacre was to liquidate all possible witnesses to the robbery. This may be inferred from the fact that after the shooting, one of the accused remarked that three of the party, obviously referring to Gomez, Ostrea, and Magdaraog were able to escape; and forthwith, the conspirators dispersed to hunt down them but because of the ensuing darkness, rough terrain and vegetation, and inasmuch as they had a head start while the conspirators were busy robbing their dead victims, Gomez, Ostrea and Magdaraog were able to escape.

The crime committed was that of robbery with homicide. In its commission we should consider the following circumstances. Sipos, Pulido and Quinto were each carrying a Thompson Submachine Gun, a carbine and a Garand rifle, respectively, and actually used them on the victims. Boñgog was carrying a revolver, although he does not appear to have actually used it. The crime was therefore committed by a band. The trial court found that the crime was committed with evident premeditation. On this point we have our doubts. It is settled that evident premeditation is inherent in the crime of robbery. So, to warrant a finding of the attendance of this aggravating circumstance in the complex crime of robbery with homicide, it must be linked with and considered with the killing. (U. S. *vs.* Landasan, 35 Phil., 365.) But there is no evidence that the conspirators previously planned and agreed to kill the victims. The lower court also found the crime attended by the aggravating circumstance of treachery. That is correct. The sudden and unexpected attack with firearms resulting in the death of the unsuspecting and helpless victims constituted treachery. The commission of the crime was further attended by the aggravating circumstance of craft. The victims were lured into going to Doñgon bridge which at the time was an isolated spot because it was the end of the road and no one would or could pass there because of the blasted condition of the southern end thereof (as shown by Exhibit O), U. S. *vs.* Gampoña (36 Phil., 817). The crime was also committed in an uninhabited place. According to the sergeant of police who made an investigation on the spot, the nearest house was about 200 yards away up the mountain side (p. 940, t. s. n.), and from the data that can be gathered from the record, including the sketch (Exhibit O), Doñgon bridge was not easily accessible because of the trees and other vegetation that stood between said house and the bridge, to say nothing of the rough terrain. There is even reason to believe that Doñgon bridge was not visible from the house. It is also obvious that the bridge was purposely sought and chosen by the appellants in order to avoid detection of the crime and preclude any interference with its commission or any help to the victims. There was also the circumstance that the crime was committed by attacking a vehicle. With the attendance of all these circumstances, the case comes under the provisions of article 295 of the Revised Penal Code, as amended by Republic Act No. 12, section 2, which provides for the imposition of the penalty of *reclusión perpetua* to death corresponding to the complex crime of robbery with homicide in its maximum period, namely, death.

We notice, however, that at the time Quinto testified in court in December, 1947, he gave his age as eighteen, and there is no evidence to disprove his claim as to his age.

It is, consequently, obvious that at the time of the commission of the crime in June of the same year, he was less than eighteen. We therefore have to apply the provisions of article 68, paragraph 2 of the Revised Penal Code which provides that upon an offender over fifteen and under eighteen years of age, the penalty next lower than that prescribed by law shall be imposed. As already stated, the penalty imposed by the law on the crime herein committed is death. The penalty next lower is *reclusión perpetua.*

In view of the foregoing, we find the guilt of the appellants to have been established beyond reasonable doubt. On Crestituto (Tito) Quinto, the penalty of death imposed by the trial court is hereby reduced to *reclusión perpetua.* With regard to Pedro Pulido and Irineo Boñgog, it becomes our painful duty to affirm the death penalty imposed upon them by the trial court. With this modification, the decision appealed from, is hereby affirmed with costs.

The penalty of death imposed upon Pulido and Boñgog will be carried out and executed on a day to be fixed by the trial court, within thirty days after the return of the record of the case to the said court.

Moran, C. J., Ozaeta, Pablo, Bengzon, Padilla, Tuason, Montemayor, Reyes, and *Torres, JJ.*

MORAN, *C. J.:*

Mr. Justice Ricardo Parás voted for the affirmance of the judgment of the lower court, but, on account of his being on leave at the time of the promulgation of this opinion, his signature does not appear herein.

Judgment affirmed (death penalty) as to Pulido and Boñgog, and modified as to Quinto.

[No. L–1296. March 6, 1950]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* JOSE PALICTE, defendant and appellant

CRIMINAL LAW; TREASON; EVIDENCE; WITNESSES; MATERIAL INCONSISTENCIES.—The testimony of prosecution witnesses containing material inconsistencies is of doubtful veracity.

APPEAL from a judgment of the People's Court.

The facts are stated in the opinion of the court.

E. M. Banzali for appellant.

Solicitor General Felix Bautista Angelo and *Solicitor Lucas Lacson* for appellee.

PARÁS, *J.:*

This is an appeal from a judgment of the People's Court finding the appellant guilty of treason and sentencing him to 15 years of *reclusión temporal,* with the accessory

penalties provided by law, and to pay a fine of ₱5,000 plus the costs.

The evidence for the prosecution tends to show that in the month of August, 1943, the appellant led a group of Japanese soldiers and Filipino undercovers to the barrio of Sacsac, Catmon, Cebu City, in search of a guerrilla officer named Mercado. Upon arrival at the place, the appellant and his companions investigated Ambrosio Ares and Cornelio Diores as to Mercado's whereabouts, and when no information was obtainable from them, the appellant and his companions gathered the people together. Thereupon, a Japanese delivered a speech, the appellant acting as interpreter. After the meeting, the appellant and other Filipino undercovers burned the house of Mercado.

The same evidence tends to show that a group of Japanese led by the appellant arrested on October 18, 1943, at about five o'clock in the afternoon, Jose Bontuyan in his house in Sirao, Cebu City, on the charge of guerrilla connections; that the said Bontuyan was boxed and later investigated and tortured by the appellant.

The defense set up by the appellant is alibi, in that from June to November, 1943, he was a prisoner of the Japanese Kempei Tai. Appellant's testimony is corroborated by defense witness, Raymundo Santa Cruz.

Counsel *de oficio*, aside from relying on the alibi, contends that the appellant could not have acted freely on the occasions invoked by the prosecution.

We are inclined to sustain appellant's contention that he had merely followed Japanese orders. Prosecution witness Ambrosio Ares testified that he did not know who ordered the burning of Mercado's house, and that a Japanese captain ordered the soldiers to group together, after which the Filipinos started to get torches and burn Mercado's house. From this it is inferable that, even assuming that appellant was one of those who applied fire to the house, he did so upon orders of the Japanese captain.

With respect to the alleged arrest of Jose Bontuyan, we also believe that the appellant was a mere follower of the Japanese. This is to be deduced from the testimony of prosecution witness, Amada Solon Bontuyan (wife of Jose Bontuyan), to the effect that, "we heard the Japanese who investigated, one called Nagasima; he said come here Jose Palicte, that is the time I know his name." In other words, the one who investigated on the occasion when Jose Bontuyan was allegedly arrested was a Japanese who even called for the appellant.

Another prosecution witness, Cornelio Diores, in referring to the occasion in which Mercado was sought by the Japanese soldiers and Filipino undercovers, testified that the Japanese ordered the people to group together, from

which it is again clear that it was the Japanese who gave commands.

We cannot help entertaining a doubt as to the veracity of witnesses for the prosecution when we take into account some material inconsistencies in their testimony. For instance, while Ambrosio Ares and Cornelio Diores testified that the appellant made his own speech, Mariano Laude emphazised that the appellant only interpreted the speech of the Japanese. While Ambrosio Ares testified that there were six Filipinos, Cornelio Diores stated that there was only one Filipino. Whereas, Cornelio Diores declared that Ares was investigated before the alleged meeting, Mariano Laude testified that the investigation of Ares took place after the meeting.

Another doubtful point engendered by the evidence for the prosecution is that, although Mercado was allegedly sought by the appellant and his companions in August, 1943, there is absolutely no showing as to the reason for the search. The bare fact that Mercado might have been a guerrilla is not sufficient to prove that he was wanted on that ground. The foregoing considerations make it unnecessary for us to discuss appellant's assignment of error with reference to the admission by the trial court of the amendment of the original information after the expiration of the six-month period fixed by Commonwealth Act No. 682.

Wherefore, the appealed judgment is reversed and the appellant acquitted, with costs *de oficio*. So ordered.

Moran, C. J., Ozaeta, Pablo, Bengzon, Padilla, Montemayor, Reyes, and *Torres, JJ.*, concur.

TUASON, *J.*, dissenting:

I think the appellant was wilful collaborator. The Japanese did not coerce unwilling people to do what they themselves could easily do and were experts in-burning homes, torturing and massacring people. And unwilling collaborators did not go to the extent of committing such atrocities. I am therefore constrained to dissent.

Judgment reversed, appellant acquitted.

[No. L-1546. March 6, 1950]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* RUFINO SURALTA, defendant and appellant

CRIMINAL LAW; TREASON AND MURDER; COMPLEX CRIME OF.—As murder is an ingredient of treason, there is no complex crime of treason with murder.

APPEAL from a judgment of the People's Court.

The facts are stated in the opinion of the court.

Tomas Contreras for appellant.

Assistant Solicitor General Guillermo E. Torres and *Solicitor Jesus A. Avanceña* for appellee.

PARÁS, *J.:*

This is an appeal from a judgment of the People's Court finding the appellant guilty of the complex crime of treason with murder, and sentencing him to suffer the penalty of death, to pay a fine of ₱10,000, and to indemnify the heirs of Simon Domayre in the sum of ₱2,000, and the heirs of Felix Tamayo in the sum of ₱2,000, plus the costs. The information contained 11 counts, but the People's Court based the judgment of conviction only on counts 3, 4, 9, and 10.

The appellant is a Filipino citizen and was a USAFFE soldier at the outbreak of the last war. He surrendered to the Japanese forces and later joined the occupation Japanese constabulary. As sergeant in said organization, he was in command of the detachment in Palompon, Leyte.

Under count No. 3, the prosecution alleges that some time in May, 1944, three Filipinos escaped from forced labor in a landing field in Opon, Cebu, and disembarked in Palompon, Leyte. Appellant arrested the three in the market of Palompon and brought them to the Social Center building, from which they were taken by appellant to the Palompon Elementary School then occupied by the Japanese. Said three men were blindfolded and thereafter bayoneted to death by the Japanese.

Under count No. 4, it is alleged that Simon Domayre, a guerrilla suspect, was arrested in Barrio San Pedro, Palompon, Leyte, some time in June, 1944, upon order of the appellant. Placido Pajaron, who made the arrest with another unidentified person, delivered Simon Domayre to the appellant in the Social Center building, where appellant boxed Simon and hit him with a baseball bat, made him drink as much water as he could, put him on the table, placed a board on his stomach, after which appellant and two Japanese soldiers stepped on the board causing the water to rose from Simon's mouth and nose. Subsequently, the appellant brought Simon to the municipal jail. At about eight or nine o'clock in the evening, two men maltreated Simon upon order of the appellant, after which appellant slapped and kicked the two men upon seeing that they were half-hearted in their task. The appellant then ordered Carlos Guzman, a policeman, to kill Simon and, upon Guzman's refusal to do so, he was boxed by the appellant who afterwards hit Simon in the forehead with a bottle causing his death.

Under count No. 9, the evidence for the Government shows that in July, 1944, the appellant arrested and boxed

Nicanor Sy on suspicion that he was aiding the guerrillas. The appellant brought Nicanor to the Social Center building of Palompon, Leyte, where he was investigated and maltreated by the appellant.

The evidence for the prosecution as to count No. 10 is to the effect that in the later part of June, 1944, the appellant arrested in Palompon, Leyte, Felix Tamayo and brought him to the constabulary headquarters where he was maltreated by the appellant. The latter brought Felix to the Social Center building where he tied him to the bars of a window and investigated him about his guerrilla connections. Upon his refusal to admit that he was a soldier, the appellant gave Felix fist blows and later hit him with an iron bar. When Felix still denied, the appellant thrust the iron bar into his mouth until Felix was forced to admit that he was a soldier. The appellant later brought Felix to the seashore and bayoneted him to death.

Count No. 3 is supported by the testimony of Cipriano Payos and Deogracias Astorga, two school teachers of Palompon, Leyte. The contention of attorney for appellant is that the two-witness rule has not been satisfied because Astorga learned of appellant's reason for arresting the three men who escaped from Japanese forced labor only from the boatmen who brought them to Palompon. This contention is not tenable because, according to the record, Astorga came to know the motive for said arrest also from the conversation between the appellant and his three victims when the latter were arrested.

Count No. 4 is established by the testimony of Cipriano Payos and Carlos Guzman. The criticism of attorney for appellant on this point is that only Payos testified to the maltreatment of Simon Domayre in the Social Center building. However, we find that the two prosecution witnesses testified that they saw the torture and killing of Simon in the municipal building, and this is a sufficient overt act. The alleged inconsistency between Guzman and Payos as to who struck the fatal blow on Simon may be explained by the fact that the two witnesses were not in the same positions when they witnessed the incident.

Count No. 9 is proved by the testimony of Nestorio Omega and Nicanor Sy, the latter being the very person arrested by the appellant. It is contended by appellant that Omega did not actually see the arrest but only saw Nicanor in the municipal jail. We believe, however, that the charge of having arrested Nicanor includes the act of confinement, and when witness Omega testified that he saw Nicanor in the municipal jail, he was in fact testifying on the arrest charge.

Count No. 10 is borne out by the testimony of Deogracias Astorga, Nestorio Omega and Nicanor Sy. It is

claimed by attorney for appellant that it was only Astorga who saw the arrest of Felix Tamayo and his maltreatment in the constabulary headquarters. But we find that the three witnesses saw the maltreatment of Felix in the Social Center building of Palompon, Leyte, as well as the act of killing by the appellant of Felix on the beach.

The evidence does not reveal any indication that the witnesses for the prosecution had testified falsely against the appellant for any improper motive. Hence the appellant's guilt has been proved beyond reasonable doubt. But the People's Court erred in finding the appellant guilty of the complex crime of treason with murder, because murder was an ingredient of the crime of treason, as we have heretofore held in several cases. Under the circumstances of this case, and taking into account appellant's past services with the USAFFE and the fact that he was made a mere tool of the Japanese, we are not prepared to impose the penalty of death.

With the sole modification, therefore, that the appellant is hereby sentenced (for the crime of treason) to *reclusión perpetua,* the appealed judgment is in all other respects affirmed. So ordered, with costs against the appellant.

Moran, C. J., Ozaeta, Pablo, Bengzon, Padilla, Tuason, Montemayor, Reyes and *Torres, JJ.,* concur.

Judgment modified.

[No. L-2462. Marzo 6, 1950]

EL PUEBLO DE FILIPINAS, querellante y apelado, *contra* GO LEE, acusado y apelante

DERECHO PENAL; ASESINATO; PRUEBAS; TESTIGO QUE SE CAMBIA DE APELLIDO Y DE DECLARACIÓN.—Un testigo que se cambia de apellido y de declaración, como se cambia de color el camaleon, no inspira confianza: su testimonio que es incompatible con su conducta inmediatamente despues del asesinato de su compañero J. Y. carece de valor probatorio.

APELACIÓN contra una sentencia del Juzgado de Primera Instancia de Manila. Amparo, J.

Los hechos aparecen relacionados en la decisión del Tribunal.

Sres. Floro Crisólogo, Pedro Singson Reyes y *Antonio V. Raquiza* en representación del apelante.

El Primer Procurador General Auxiliar Sr. Roberto A. Gianzon y *el Procurador Sr. Jesús A. Avanceña* en representación del Gobierno.

PABLO, *M.:*

Se trata de una apelación contra la decisión del Juzgado de Primera Instancia de Manila que condenó al acusado a

la pena de reclusión perpetua con las accesorias, a indemnizar a los herederos de Joaquin Yap en la suma de ₱2,000 y a las costas.

A eso de las ocho de la noche del 20 de Octubre de 1947, mientras Joaquin Yap y José C. Hio estaban sentados en un pequeño restaurant chino en Sto. Cristo, No. 221, Binondo, Manila, bebiendo cerveza y coca-cola, y de espaldas a la calle, un hombre disparó un tiro dejando muerto a Joaquin Yap en el acto. Inmediatamente José dió una vuelta, arrancando al mismo tiempo el revólver debajo de su camisa y vió a un hombre disparar su segundo tiro (que no hizo blanco en las personas), echando a correr después; José le persiguió y al torcer la esquina de la calle San Fernando, vió al hombre entrar en la puerta del club chino (San Fernando, No. 915), y encontrando luego a dos personas en paisano, les preguntó quiénes eran y contestaron que eran policías. José les informó que aquel hombre a quien perseguía y que había entrado en el club era el que había muerto a Joaquin Yap de un disparo de revólver. José y los policías subieron a dicho club y encontraron a varias personas; José indicó a un chino que estaba temblando diciéndoles que era el hombre que había disparado el tiro; los policías le arrestaron, y, preguntado por su nombre, dijo que se llama Tan Hiap Seng. Los policías Martin Mutuc y Manero llevaron a Tan Hiap Seng y José a la estación de policía de Meisic. El policía Wenceslao Mendoza, después de hacer las investigaciones, hizo constar en el *Police blotter* lo siguiente.

"Date: Oct. 20, 1947
"8.25 p.m.—Inf. shooting affray—

"At 8.35 p.m. this date, Pat. E. Manero of this precinct notified this station that there was a shooting at 221 Sto. Cristo.

"Pat. W. Mendoza et al. responded and reported that at about 8.20 p.m. this date, while Joaquin Yap, 32 yrs., married, confidential agent of the CID–G–2 (AP) badge No. 289, native of Amoy, China residing somewhere in Sulu, Sta. Cruz and Jose Yu, 35 yrs., married, special agent (MPC) badge No. 1327, residing at No. 461 Ylaya, Tondo, were drinking beer at 221 Sto. Cristo, the former was shot from behind causing his instant death. Further, it was found out that after the shooting, Jose Yu chased the supposed assailant and later informed Pat. M. Mutuc et al. (then patrolling) that the assailant went up house No. 915 San Fernando. Pat. M. Mutuc et al. with the informant went up the house and found Tan Hiap Seng, 48 yrs., married, merchant, native of Amoy, China residing at 413 Sto. Cristo and later identified by Jose Yu as the man who shot and killed his companion. DB–Det. B. Padilla was notified and is now handling the case. The suspect and the following properties of the deceased consisting of one black leather wallet containing sixty-five centavos (₱0.65), one whistle, personal papers, one Thompson sub-machine gun serial No. 289616 and one clip fully loaded were turned over to Detective R. Padilla. The body was removed at 9.20 p.m. same date.

"W. MENDOZA" Exhibit 5).

El Sargento de Mesa Matawaran hizo constar tambien en el *complaint book* de su oficina los detalles del suceso, y son:

"Date: Oct. 20, 1947 Time: 11.25 p.m.
"How received: In person
"Nature of Complaint or Incident: Shooting affray
"Location: 221 Sto. Cristo, Binondo
"Reported by: Pat. E. Manero
"Address: Precinct No. 1
"Officers assigned: Pat. W. Mendoza
"Report made by Pat. W. Mendoza Date and Time 10–20–47 8.35 p.m.

"Investigation conducted by the above officers reveals that at about 8.20 p.m., this date, while Joaquin Yap, 32 years., CID agent residing at 461 Ylaya, Tondo, were drinking beer at 221 Sto. Cristo, the former was shot from behind causing his instant death. It was further stated that the companion Jose Yu chased the supposed assailant and informed Pat. M. Mutuc et al that assailant went up house No. 915 San Fernando. The patrolman with the informant went up the said house and found Tan Hiap Seng, 48 years., residing at 915 San Fernando and later identified as the very person who shot and killed Joaquin Yap. Case was turned over to the Det. Bureau thru Det. Padilla who is handling the case." (Exhibit 6.)

Al siguiente día, fué arrestado Go Lee aunque no consta en autos quién fué el denunciante; pero es indudable que fué José por medio de su declaración jurada Exhibit X–1, suscrita ante un notario público a las 5.40 de la mañana del día siguiente. No hay ningún dato fuera de esa declaración jurada que explique por qué se puso en libertad a Tan Hiap Seng que fué cogido en el club chino inmediatamente después de perpetrado el asesinato y en su lugar fué acusado Go Lee.

En el día de la vista, José, el único testigo presencial del asesinato de Joaquin Yap, declaró que cuando él y los policías habían llegado en los altos del club, un chino estaba temblando, por tal motivo, los policías Mutuc y Manero le cogieron; que sabía que el autor del asesinato era Go Lee; y que ya le conocía desde el Mayo de 1947. Estas declaraciones son completamente incompatibles con sus declaraciones y conducta inmediatamente después del crimen. Si es verdad que Go Lee fué el que disparó el tiro fatal, el testigo no hubiera perseguido a Tan Hiap Seng informando a los policías que encontró en la calle San Fernando que el que perseguía era el autor del crimen, y estando ya en los altos del club chino, no hubiera indicado a dicho Tan Hiap Seng asegurando que fué el que disparó el tiro. Es increible que los policías hayan arrestado a Tan Hiap Seng sin la indicación del testigo. Si los policías *motu proprio* arrestaron a Tan Hiap Seng, el testigo hubiera dicho a los policías que el autor era Go Lee y no Tan Hiap Seng. Es completamente contrario al curso natural de las cosas el que el testigo haya tenido la serenidad y paciencia de guardar en secreto el nombre de Go Lee a pesar de las

varias investigaciones hechas por los policías y que solamente en la madrugada siguiente fué cuando lo reveló. No es imposible que Tan Hiap Seng, un comerciante que debía tener recursos porque podía darse el lujo de asistir a un club, por dinero o por alguna promesa, haya podido inducir al testigo a cambiar su declaración, librándole de una condena segura. Y la proposición venía de perlas porque Go Lee le había denunciado por lesiones en 18 de Julio de 1947 (Exhibit 4). Era oportunidad para vengarse de él.

Las declaraciones del testigo en presencia de los policías Mutuc y Manero que le acompañaron a buscar al acusado en el club chino, ante el policía Mendoza y ante el Sargento de Mesa Moises Matawaran inmediatamente después del suceso son más dignas de crédito que la declaración hecha por él durante la vista de la causa que tuvo lugar en 19 de Diciembre de 1947.

Según convenio de ambas partes, el testigo deletrea su apellido de varias maneras: José Se Hiyo se llama en la querella y en el *affidavit* Exhibit X–1; José C. Hio, en la vista de la causa; José Hio, cuando fué investigado por el policía Mendoza; y José Yu, en la investigación del Sargento de Mesa Moises Matawaran. Un testigo que se cambia de apellido y de declaración, como se cambia de color el camaleon, no inspira confianza: su testimonio que es incompatible con su conducta inmediatamente después del asesinato de su compañero Joaquin Yap carece de valor probatorio.

Por otra parte, Go Lee en la noche del suceso fué invitado a un *blow out* en el Shanghai Restaurant, calle Alonso, y con él asistieron Berto Chan, Lim Pang Kee, We Kim Piao, José Young, Ang Chio, Go, y Lim. Después de la cena fué acompañado a su casa en la calle Pampanga. Corroboró su testimonio Berto Chan.

La oficina del Procurador General, después de discutir detalladamente las pruebas de ambas partes, recomienda la revocación de la sentencia apelada. Estimamos bien fundada la petición.

Revocamos la sentencia condenatoria con las costas de oficio y ordenamos la inmediata libertad del acusado.

Moran, Pres., Ozaeta, Bengzon, Padilla, Tuason, Montemayor, y *Reyes MM.,* están conformes.

Se revoca la sentencia.

[No. L–2665. March 6, 1950]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* FLORENTINO PATERNO, ARADES LAGBAWAN, CERBESA MALIMBASAO, SARMIENTO PANGANAY, ENRIQUE LEMENTE and MANGAPA TALBIN, defendants and apellants.

1. CRIMINAL LAW; MURDER; EVIDENCE; FAILURE TO INTRODUCE IMPORTANT EVIDENCE.—It is unthinkable that evidence of vital

importance to their defense, so vital as to be the sole point stressed by them in the court below and in this instance, should have been forgotten or withheld by all the accused, except two, for no other reason than fear of an absent, or dead, man.

2. ID.; ID.; ID.; CERTIFIED TRUE COPIES OF CARBON COPIES, ADMISSIBILITY OF.—Certified true copies of carbon copies of the original of accused's confessions, copies which were kept at the office of the justice of the peace, are admissible in evidence. The non-presentation of the copies which contained the defendants' signatures was explained: the original had been destroyed by fire.

3. ID.; ARSON; SETTING FIRE TO THE HOUSE WITH THE RESULTING DEATH OF A CHILD.—For setting fire to the house with the resulting death of the child, they are guilty of arson, not murder, under article 321, paragraph 1, of the Revised Penal Code. Murder or homicide is absorbed in arson as defined in this article. Murder or homicide in a juridical sense would exist if the killing were the objective of the malefactor and the burning of a building were resorted to only as the means of accomplishing his purpose. The rule is otherwise when arson is itself the end and death is a mere consequence.

APPEAL from a judgment of the Court of First Instance of Davao. Fernandez, J.

The facts are stated in the opinion of the court.

Pascual V. Garcia, Jr. for appellants.

First Assistant Solicitor General Roberto A. Gianzon and *Solicitor Antonio A. Torres* for appellee.

TUASON, *J.:*

There is little or no dispute as to these facts. The appellants were members of an underground organization called volunteer guards. On February 8, 1943, while they and other volunteer guards were gathered at their camp in barrio Tagabakid, municipality of Mati, province of Davao, they were attacked by a Japanese patrol guided by Primo Jurolan and Demenciano Chavez. On the 12th, the appellants, with Ignacio Vicente, Tranqui Manapos and other volunteer guards, marched to Jurolan's barrio, one or two kilometers distant from their camp, in search of the men who had betrayed them. Finding Jurolan and his wife, Delfina Gatillo, below their house, defendants Cerbesa Malimbasao, Arades Lagbawan and Sarmiento Panganay tied Jurolan's hands behind his back and led him upstairs. Jurolan's wife's hands were similarly bound and she was taken into the house, but the identity of the accused who did this is not disclosed by the record. Inside the house, the couple were stabbed and killed with daggers, the husband by Arades Lagbawan and the wife by Enrique Lemente. When the victims were already dead, Mangapa Talbin set fire to the house with Jurolan's three day-old live infant, as well as its parents' lifeless bodies, inside, as the result of which the child perished in the fire. The accused took Jurolan's two elder children out of the house before burning the house.

The court below found the defendants guilty of murder for the death of Delfina Gatillo and sentenced Florentino Paterno to *reclusión perpetua* and his five co-defendants to an indeterminate penalty of from 10 years and 1 day to 17 years, 4 months and 1 day of *reclusión temporal,* and to indemnify the heirs of the deceased in the sum of ₱2,000. For the death of the child (no reference to the burning of the house was made) the court sentenced all the accused to *reclusión perpetua* and to pay an indemnity of ₱2,000 to its heirs. The accused were also condemned to pay proportionate shares of the costs. For the murder of Primo Jurolan, the defendants were pronounced entitled to the benefits of amnesty Proclamation No. 8 for the reason that Jurolan, as the court found, was a Japanese spy.

The defendants' plea on this appeal is that they acted in obedience to direct orders and threats of one Anselmo Onofre. It is alleged that they committed the crimes from fear of that man, fear of being themselves slain if they refused to comply. It is said that Onofre was the recognized overall commander of the defendants' organization and that he was the only one who had a firearm, a .45 caliber pistol, the defendants being provided with no more weapons than bolos.

The accused did not introduce any evidence on their behalf to substantiate their plea. They rested their case on the testimony of Ignacio Vicente and Tranqui Manapos, two of their companions who were used by the prosecution as witnesses.

As the Solicitor General says in his brief, these witnesses turned hostile to the prosecution and testified virtually in favor of the appellants. Ignacio Vicente swore on direct examination that Paterno was the leader of the band and was the man who had Primo Jurolan and his wife killed and their house burned with their baby inside. But on cross-examination, in answer to very leading questions, he declared that Anselmo Onofre it was who was their supreme commander and who ordered the slaying of the Jurolan couple and the destruction of their dwelling. The next witness for the prosecution, Tranqui Manapos, in his examination-in-chief declared in the same vein as Vicente did on cross-examination.

It is to be noted that in these two witnesses' affidavits, sworn to before the justice of the peace, and in their testimony before the provincial fiscal, not even a hint was made of Anselmo Onofre. For this reason the trial judge believes that what is contained in Vicente's and Manapos' affidavits is the truth and that in deviating from their previous statements their motive was no other than a desire to free Paterno from punishment. In this we concur. Vicente's and Manapos' explanation for not nam-

ing Onofre to the justice of the peace and the fiscal; that is, they were afraid of him, is unconvincing, since Onofre was not around when they made their statements—in fact Onofre's whereabouts was unknown—and particularly since they were already in the custody and under the protection of peace officers. Moreover, the affidavits were made in June, 1946, when the war was over, complete peace and order had been restored and civil government reestablished.

The defendants themselves made written and sworn confessions before the same justice of the peace, and none of them, except Paterno and Lemente, implicated Onofre. More, these confessions were produced by the accused before the Amnesty Commission as the sole evidence on which they relied for their petition for discharge under the amnesty. It is unthinkable that evidence of vital importance to their defense, so vital as to be the sole point stressed by them in the court below and in this instance, should have been forgotten or withheld by all the accused, except two, for no other reason than fear of an absent, or dead, man.

The defendants take exception to the admission of their confessions, introduced in evidence as Exhibits D, E, F, G and I, on the theory that they were mere copies. The objection is not well taken. The impugned exhibits are certified true copies of carbon copies of the original, copies which were kept at the office of the justice of the peace. The non-presentation of the copies which contained the defendants' signatures was explained by the fiscal, who stated that the original had been destroyed by fire.

Exhibits D to I, independent of Vicente's and Manapos' testimony, are in themselves conclusive proofs of appellants' guilt. Their voluntary character has not been challenged. Although Paterno's affidavit (Exhibit D) incriminates Onofre, yet it does not speak of compulsion or duress brought to bear on him or any of his fellow-defendants. So even if we should assume, for the sake of argument, that the crimes at bar were perpetrated by Onofre's order, such order would not serve to justify or excuse appellants' deeds.

It was only Lemente, the accused who, besides Paterno, implicated Onofre, that made a statement which, if true, might exempt him from criminal responsibility with respect to the killing of Delfina Gatillo. Lemente stated in his affidavit that Onofre commanded him at the point of a pistol to kill Jurolan's wife. But no credence can be given to this part of Lemente's statement. There was absolutely no need for Onofre, granting that he was present, to force an unwilling tool to take the life of a defenseless woman when to do the killing himself would require less effort on his part than to threaten and intimidate a comrade.

From the facts set forth in this decision, the appellants have been correctly found guilty of murder with reference to the slaying of Delfina Gatillo, but they had the same degree of participation in the crime and all should be sentenced to *reclusión perpetua*. For setting fire to the house with the resulting death of the child, they are guilty of arson, not murder, under article 321, paragraph 1, of the Revised Penal Code. Murder or homicide is absorbed in arson as defined in this article. Murder or homicide in a juridical sense would exist if the killing were the objective of the malefactor and the burning of a building were resorted to only as the means of accomplishing his purpose. The rule is otherwise when arson, as in this case, is itself the end and death is a mere consequence. However, the punishment imposed by the trial court for this act is correct in view of all the circumstances. The indemnity for Delfina Gatillo's and her baby's death should be raised to ₱6,000 each. With these modifications, the appealed decision is affirmed, with costs of the appeal charged against the appellants in equal share.

Moran, C. J., Ozaeta, Pablo, Bengzon, Padilla, Montemayor, and *Reyes, JJ.,* concur.

Judgment modified.

[No. L-2996. March 6, 1950]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* PRECIANO MEJARES ET AL, defendants. LUCIO LUANGCO, FEDERICO LUANGCO, ANTONIO JARIOL, BERNARDO GANALON and LUIS GANALON, appellants.

CRIMINAL PROCEDURE, RULES OF; RIGHT OF ACCUSED; TIME TO PREPARE FOR TRIAL.—Under section 7 of Rule 114 of the Rules of Court, after a plea of not gulity, except when the case is on appeal from the justice of the peace, the defendant is entitled to at least two days to prepare for trial unless the court for good cause shown shall allow further time. This requirement is mandatory and, by its terms, the defendant is entitled as of right to at least two days to prepare for trial, and a denial of this right is a reversible error and a ground for new trial.

APPEAL from a judgment of the Court of First Instance of Leyte. Baltazar, J.

The facts are stated in the opinion of the court.

P. L. Meer for appellants.

Assistant Solicitor General Inocencio Rosal and *Solicitor Juan T. Alano* for appellee.

PARÁS, *J.:*

This is an appeal from a judgment of the Court of First Instance of Leyte, finding the herein appellants, Lucio Luangco, Federico Luangco, Antonio Jariol, Bernardo

Ganalon and Luis Ganalon, guilty of sedition with murder and sentencing each of them to suffer the penalty of *reclusión perpetua* and to indemnify jointly and severally the heirs of Eleuterio Ramos in the amount of ₱5,000. The same judgment convicted appellants' seven co-accused, but the latter did not appeal.

Under the first error assigned by appellants' counsel *de oficio*, it is contended that the appellants were denied time to prepare for trial. The Solicitor General agrees to this contention. It appears that on January 31, 1948, fifty-nine persons were prosecuted in the Court of First Instance of Leyte for the offense of sedition with murder committed on May 4, 1947, in the municipality of Tanauan, Leyte. On February 4, 1949, the information was amended by reducing the number of the accused to twelve. In both informations, the herein appellants were included. On February 25, 1949, at nine o'clock in the morning, Atty. Fernando Sudario, then representing some of the accused, was appointed by the court to act as atttorney *de oficio* for all the other accused. After arraignment on the same day, said attorney moved for the postponement of the trial on the ground that he was not prepared therefor, in view of the fact that he was appointed only on that day as attorney for some of the accused. This motion was denied by the court which ordered the parties to proceed with the trial. After said trial, the court rendered the judgment hereinabove indicated.

In stating that he was not prepared for trial, Attorney Sudario argued that, as the affidavits of the witnesses for the prosecution were not attached to the record, he could not learn the basis of the information. In denying the motion for postponement, the trial court ruled that the names of the witnesses for the Government are listed in the original and amended informations. Regardless of the merit of the ground advanced by Attorney Sudario in support for his motion for postponement, or of the merit of the denial by the trial court, the fact is conspicuous that defense counsel was not ready for trial on the date the appellants were arraigned. Under section 7 of Rule 114 of the Rules of Court, after a plea of not guilty, except when the case is on appeal from the justice of the peace, the defendant is entitled to at least two days to prepare for trial unless the court for good cause shown shall allow further time. This requirement has been held to be mandatory and, by its terms, the defendant is entitled as of right to at least two days to prepare for trial, and a denial of this right is a reversible error and a ground for new trial. (Moran, Comments on the Rules of Court, 2d ed., Vol. II, page 688, citing the case of People *vs.* Valte, 43 Phil., 907.)

Wherefore, following the recommendation of the Solicitor General, the appealed judgment is hereby set aside and the case remanded to the trial court for further proceedings, for the reception of such additional evidence as the interest of justice may require, and for the rendition thereafter of the corresponding judgment. So ordered, with costs *de oficio*.

Moran, C. J., Ozaeta, Pablo, Bengzon, Padilla, Tuason, Montemayor, Reyes, and *Torres, JJ.,* concur.

Judgment set aside and case remanded for further proceedings.

[No. L-2335. March 7, 1950]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* FRANCISCO MORENO (*alias* BALBINO MORENO), defendant and appellant.

CRIMINAL LAW; MURDER; EVIDENCE; CAUTION OR WARNING GIVEN TO OTHERS BY ACCUSED.—The caution or warning made by the accused to those who witnessed the commission of the crime not to reveal what they had done and seen, shows the guilt of the appellant of the crime with which he is charged. As the person who had ordered the liquidation of the deceased, appellant is necessarily criminally responsible for the killing.

APPEAL from a judgment of the Court of First Instance of Pangasinan. De los Santos, J.

The facts are stated in the opinion of the court.

Maximo V. Cuesta, Jr. for appellant.

First Assistant Solicitor General Roberto A. Gianzon and *Jose O. Moran* for appellee.

MONTEMAYOR, *J.:*

This case is here on appeal brought by Francisco Moreno *alias* Balbino Moreno seeking to reverse the decision of the Court of First Instance of Pangasinan, wherein he was found guilty of murder and sentenced to *reclusión perpetua* with the accessories of the law, to indemnity the heirs of the deceased Manuel Artates in the amount of ₱6,000, and to pay the costs.

During the Japanese occupation appellant Francisco Moreno *alias* Balbino Moreno and his brother Domingo Moreno were members of a guerrilla organization led by Lt. Crispin Sinlao and one Modesto Tabaqueri, operating in the municipalities of Mañgatarem, Aguilar and other neighboring towns in the province of Pangasinan. It seems that Sinlao and Tabaqueri were subsequently killed by the Japanese and defendant Francisco Moreno and one Eufemiano Artates took their places as leaders or commanding officers of the organization. Because of this change in command and because of the death of the former leaders, it seems that many of the followers lost

much of the loyalty and interest that they had before. For the purpose of disciplining and bringing them back to the organization, Moreno and Eufemiano began rounding up and threatening and punishing these supposed deserters or renegades, some of whom were even suspected of transferring their sympathies if not their loyalty to the Japanese.

In the evening of December 25, 1944, the appellant and his brother Domingo accompanied by a number of their men went to the house of Manuel Artates, in the barrio of Pogoncile, Aguilar, Pangasinan. Several armed men, evidently, by order of appellant went up the house and brought down Manuel. As he came down the stairs he was met by the appellant and his brother Domingo both of whom immediately beat him up with a piece of wood and with the butt of a gun, and when he fell down, the defendant kicked him. Manuel Artates pleaded with the two brothers and begged that before they did anything to him, he first be investigated, but the Moreno brothers told him that it was not necessary.

That same evening the group took Manuel Artates with his hands tied behind his back, to the Marapudo mountains in Mañgatarem, which seems to be the hideout or headquarters of the organization. There a hole was dug. A captive named Jose Jasmin who had previously been taken by other members of the organization was first beheaded by the executioner named Patricio Gerardo. His dead body was dumped into the hole and lightly covered with earth. Then came the turn of Manuel Artates. He was made to sit inside the hole with his hands still tied behind his back, and he was similarly beheaded by the same executioner. The execution was witnessed by the appellant who stood nearby, watching. After the hole was completely covered with earth the defendant Francisco cautioned all the men who took part in or witnessed the execution as well as the kidnaping of the two men not to reveal to anyone what they had done and what they had seen that night under penalty of punishment.

Sometime in 1946, Isidoro Torio, one of those who had witnessed the execution and the burial of Manuel Artates, met Carlota Collado, widow of the deceased and told her that she need not look for her husband anymore for he was killed and buried in the mountains. He later accompanied the party which at the instance of Carlota exhumed the body and he (Torio) together with the widow duly identified the remains exhumed as that of Manuel Artates not only by the clothing worn but also by a missing tooth. On the same occasion, after the remains of Manuel Artates were recovered from the shallow grave, those of Jose Jasmin which lay beneath, were also exhumed and were identified by his family. The killing was denounced to

the authorities and those who participated in it, including Domingo Moreno were charged with murder in criminal case No. 17366 of the Court of First Instance of Pangasinan. Because appellant Francisco Moreno was still at large, he was accused later in the present case (criminal case No. 17493) of the same court.

Appellant Moreno does not deny his presence on the night in question in or near the house of the deceased Manuel Artates, the taking of said Manuel Artates to the mountains and his execution, although he claims that when Manuel was killed, he (Francisco) was some distance away detailed as guard by Eufemiano Artates, his superior. He further asserts that he was merely obeying orders of Eufemiano, he being a mere private in the guerrilla organization, and that when Manuel Artates was brought down from his house and ill-treated by his brother Domingo Moreno, he (Francisco) interceded, saying that Manuel should not be punished before he was duly investigated. In this he was corroborated by his brother Domingo who testified as a witness for him.

This claim of the appellant is completely belied and disproved by the evidence on record. In another criminal case No. 16728 where members of the same guerrilla organization to which the appellant belonged were prosecuted for murder based on the killing of Jose Jasmin who as already stated, was beheaded the same night by Patricio Gerardo and buried ahead of Manuel Artates in the same grave, the accused therein in their testimonies unhesitatingly pointed to Francisco Moreno, the appellant herein as the leader of the organization who had Jose Jasmin arrested and executed for being suspected as a Japanese spy. In criminal case No. 17366 already mentioned where Domingo Moreno together with others were accused of murder for the killing of Manuel Artates, the accused therein testifying as witnesses, also pointed to Francisco, the herein accused-appellant as the leader whose orders they were obeying in the kidnaping and killing of Manuel Artates. Even Domingo Moreno, brother of appellant testified in said case that his brother Francisco, the herein appellant was the leader, but he (Domingo) tried to exculpate himself saying that when Manuel Artates was taken down from his house he was far away from said house. Naturally, we cannot now believe Domingo when testifying for his brother he says that Francisco was a mere private in the guerrilla organization obeying orders of Eufemiano Artates, the leader, and that when he (Domingo) proceeded to maltreat Manuel Artates as he was brought down from his house, Francisco interceded for him.

There are other proofs to support the finding that appellant Francisco was the leader or was one of the

leaders, if not of the organization that operated in the towns of Mañgatarem and Aguilar, at least of the group of men which forcibly took Manuel Artates from his home, took him to the mountains and there killed him. The maltreatment of Manuel Artates by appellant as the former came down from his house was witnessed and testified to by two witnesses including the widow Carlota Collado. Isidoro Torio another witness for the Government told the court that on the night in question he was sent for by herein appellant, and once in the Marapudo mountains, he was investigated by Francisco Moreno and even threatened with an unsheathed bolo, and when Torio assured the defendant that he was not a Japanese spy, appellant said that his life would be spared. In answer to a question, Torio assured the court that the appellant was one of the commanding officers at the guerrilla headquarters in the Marapudo mountains. Lastly, the fact that Francisco was present at the execution and burial of Manuel Artates and later cautioned those who kidnapped Manuel Artates and those who witnessed the execution and helped in covering the grave with earth, including witness Torio not to reveal what they had done and seen that evening, shows that he (the appellant) was the one in charge of all that took place that fateful night and whose orders were obeyed. As the person who had ordered the kidnapping and killing of Manuel Artates, the appellant herein is necessarily guilty of the crime with which he is charged.

As to the motive for the killing, we are at a loss, unless, we draw an inference or conclusion from some incidents that took place that night and prior thereto. As already stated Isidoro Torio was, by order of the appellant taken from his house and investigated and threatened by him for being suspected as a Japanese spy; and when satisfied that the suspicion was unfounded, appellant spared his life. At the beginning of this decision we stated that after the death of Lt. Sinlao, Francisco Moreno and Eufemiano Artates took over the command of the organization and because many of the followers appeared to have lost interest in the activities of the organization and some were even suspected of developing sympathy for the Japanese, said followers were ordered arrested, taken to the headquarters and investigated. The inference is that Manuel Artates was killed because he was suspected of being a Japanese spy, or that he refused to recognize the leadership of the appellant, or that he had deserted the organization or lost interest in it assuming of course that he belonged to it, or that he refused to help or cooperate with the organization. Or, the motive may have been purely personal, although there is no evidence on that point.

In conclusion we find the appellant guilty of murder as charged in the information and as found by the trial

court. The decision appealed from is hereby affirmed with costs.

Moran, C. J., Ozaeta, Pablo, Bengzon, Padilla, Tuason, and *Reyes, JJ., concur.*

MORAN, *C. J.:*

Mr. Justice Ricardo Parás and Mr. Justice Luis P. Torres voted for the affirmance of the judgment of the lower court, but, on account of their being on leave at the time of the promulgation of this opinion, their signatures do not appear herein.

Judgment affirmed.

[No. L-3643. March 7, 1950]

CARLOS ASPRA Y CRUSILLO, petitioner, *vs.* THE DIRECTOR OF PRISONS, respondent

HABEAS CORPUS; PRISONER'S RELEASE; IMPRISONMENT UNDER THE THREEFOLD RULE OF ARTICLE 70 OF THE REVISED PENAL CODE.—When a prisoner had already served the period provided under the threefold rule of article 70 of the Revised Penal Code, he is entitled to be released through the writ of habeas corpus because in such cases the prisoner's imprisonment should not exceed three times the most serious of the six sentences he got, plus subsidiary imprisonment for the total indemnity he had been condemned to pay the offended parties.

ORIGINAL ACTION in the Supreme Court. Habeas corpus.

The facts are stated in the opinion of the court.

Petitioner in his own behalf.

Assistant Solicitor General Ruperto Kapunan, Jr. and *Solicitor Martiniano P. Vivo* for respondent.

TUASON, *J.:*

Carlos Aspra y Crusillo applies for the writ of habeas corpus directed to the Director of Prisons. In his return on behalf of the respondent, the Solicitor General agrees that the petition should be granted.

It appears that the petitioner was committed to the New Bilibid Prison in Muntinglupa, Rizal, of which the respondent is the director, on October 23, 1948, to serve six sentences meted out by the municipal court of the City of Manila in six different cases of *estafa.* In each case, the penalty imposed was 3 months and 11 days of *arresto mayor* with an indemnity the total of which was ₱114.

In U. S. *vs.* Ballesteros (1 Phil., 208), this Court held that "A defendant convicted of eight crimes of *estafa* must be sentenced to a total penalty not to exceed three times the penalty provided by law for one of the crimes." And in Bagtas *vs.* Director of Prisons (47 Off. Gaz., 1743), a case analogous to the case at bar in many particulars,

it was ruled that the length of the petitioner's imprisonment not exceed three times the most serious of the six sentences he got, plus subsidiary imprisonment for the total indemnity he had been condemned to pay the offended parties.

The petitioner in the instant case had up to the date of his petition gone through 1 year, 3 months and a number of days' imprisonment, already beyond the period provided under the threefold rule of article 70 of the Revised Penal Code.

The petitioner is therefore entitled to the writ, and the respondent is ordered to release him immediately, without costs.

Moran, C. J., Ozaeta, Pablo, Bengzon, Padilla, Montemayor, and Reyes, JJ., concur.

Writ granted.

[No. L–2269. March 14, 1950]

FABIAN B. S. ABELLERA, plaintiff and appellant, *vs.* NARCISO DE GUZMAN ET AL., defendants and appellees

1. COURTS; CADASTRAL COURT; AUTHORITY AS TO DAMAGES.—The cadastral court possesses no authority to award damages, for its power is confined to the determination as to whether the claimants are really entitled to the lots, as alleged in their answers; and, after finding that they are, to the confirmation of their title to, and registration of, the lots in their name.
2. ID.; ID.; EJECTMENT; EXTENT OF JURISDICTION.—Where there is a case for ejectment between parties who, one against the other, claim the same parcel of land or lot in a cadastral case, it has been customary or the practice of courts to hold a joint hearing of both the ejectment and the cadastral cases in which the same parcel of land is litigated and to render a decision in both cases in its double role, as court of first instance of general jurisdiction and as cadastral court of limited jurisdiction.

APPEAL from an order of the Court of First Instance of La Union. Panlilio, J.

The facts are stated in the opinion of the court.

Fabian B. S. Abellera for appellant.
Benito D. Diaz for appellees.

PADILLA, *J.:*

On 22 March 1918 this Court affirmed a judgment rendered by the court of first instance of La Union dismissing the complaint, by which the plaintiff sought to eject nineteen alleged trespassers or squatters from a tract of land described in the complaint, "on the ground that plaintiff failed to establish title in himself to the *hacienda* upon which he could maintain an action of ejectment." Plaintiff claimed title to the *hacienda* by virtue

of a donation which he failed to accept in a public instrument as required in article 633 of the Civil Code (Abellera *vs.* Balanag, 37 Phil. 865). After the dismissal of the complaint, the plaintiff brought another action against the same defendants for ejectment (civil case No. 936 of the court of first instance of La Union). This second action was dismissed, on the ground that the title to the tract of land from which he sought to eject the defendants might well be litigated in the cadastral case then pending in the same court which included the tract of land, divided into lots and claimed by both the plaintiff and the defendants, the court of first instance being of the opinion that, should title to the tract of land be confirmed and decreed in the name of the plaintiff, the latter could bring an action against the defendants for damages. From this order of dismissal, the plaintiff did not appeal. When in the cadastral case, however, the answers of the plaintiff claiming the lots, into which the tract of land claimed by him as his property had been divided, were striken out and he was prevented from presenting evidence to prove his title to the tract of land or to the lots into which it had been divided, he applied to the Supreme Court for a writ of *certiorary*, which was granted (Fabian B. S. Abellera *vs.* Hon. Meynardo M. Farol, Narciso de Guzman el al., G. R. No. 48480, 30 July 1943). This Court in the last mentioned case reversed the order of the respondent cadastral court and directed it to allow the petitioner "to present evidence to prove his claim over the lots in question;" and, commenting on the judgment rendered in the previous case (Abellera *vs.* Balanag, *supra*), it made the following pronouncement: "* * * and we clearly refused to prevent Abellera from instituting a new action based upon his assertion that he had acquired title to the estate since the dismissal of his original action." So the plaintiff's claim in the cadastral case No. 5 of the municipality of Aringay, Province of La Union, to the lots into which the tract of land was divided and from which he had sought defendants' ejectment in the two previous actions brought by him in the court of first instance of La Union, was pending when the record of the cadastral case was destroyed as a result of the battle for liberation; and, in view of the failure of the interested parties or of the Director of Lands to institute proceedings for its reconstitution, on 5 February 1946 the plaintiff in the two previous cases brought the present action for ejectment against the same defendants in the two previous cases (civil cases Nos. 773 and 936 of the court of first instance of La Union), or their successors-in-interest, including new or additional defendants who are the claimants of lots Nos. 5009, 5010 and 5540 in the cadastral case, which lie within the area of the tract of land claimed by the plaintiff, and prayed for judgment declaring him

the owner of the tract of land from which he had sought defendants' ejectment in the two previous cases; for the possession of the lots unlawfully occupied or detained by the defendants; for the recovery of damages from each and everyone of the defendants, amounting all in all to ₱40,000 and costs; and for general relief. Instead of answering the complaint the defendants moved for its dismissal, on the ground (1) that it states no cause of action; and (2) that there is another action pending between the same parties for the same cause. On 18 June 1946, acting upon the motion to dismiss filed by the defendants, the trial court sustained the second ground of the motion and dismissed the complaint without costs. In dismissing the complaint, the trial court was of the belief that in the *certiorari* case (Fabian B. S. Abellera *vs.* Hon. Meynardo M. Farol, Narciso de Guzman et al., G. R. No. 48480, *supra*), this Court directed the plaintiff "not to file a new action, to have his claim over the lots in question asserted, but to present evidence to prove his claim over said lots in the Cadastral Proceedings, Cadastral Case No. 5, of Aringay, La Union." The plaintiff has appealed from this order of dismissal to the Court of Appeals. After reviewing the evidence, the latter court certified the appeal to this Court for the reason that only questions of law are raised or involved.

Although the present action is entitled "Recurso Declaratorio" and in paragraph 7 of the complaint, reference is made to section 1, Rule 66, of the Rules, it is really for ejectment and damages. The plaintiff asserts title to the tract of land which was divided into several lots when it was surveyed for the institution of cadastral proceedings and he filed answers to claim the lots as his property in the cadastral case. It is the third action brought to have the court declare that he is the owner and entitled to the possession of the tract of land divided into lots in the cadastral case, which are also claimed by the defendants, and to recover its possession and damages for the unlawful occupation and detention thereof. The complaint may appear clumsily drawn up, but there is no question that it is not for declaratory relief, as provided for in Rule 66 of the Rules of Court, but for ejectment (*reivindicación*) and for damages. So, the first ground of the motion to dismiss the complaint is not well taken. The court below has made no comment on it, for it must have been of the opinion that the complaint states a cause of action.

The second ground for the dismissal of the complaint, to wit: that there is another action pending between the same parties for the same cause, upon which the order of dismissal appealed from is predicated, is likewise without merit, because even if the record of the cadastral case, where the lots into which the tract of land was divided, could be reconstituted, and for that reason plain-

tiff could present his claim and evidence to prove his title to the lots, nevertheless, the cadastral court possesses no authority to award damages, for its power is confined to the determination as to whether the claimants are really entitled to the lots, as alleged in their answers; and, after finding that they are, to the confirmation of their title to, and registration of, the lots in their name. In the present action for ejectment, not only does the plaintiff seek to have a judicial pronouncement that he is the owner of the tract of land which he claims is unlawfully occupied by the defendants but also to recover damages. After hearing, the cadastral court may declare the plaintiff the owner of the lots and entitled to their possession and may issue a writ directing the sheriff to put him in possession thereof, but it cannot award damages to the plaintiff. Where there is a case for ejectment between parties who, one against the other, claim the same parcel of land or lot in a cadastral case, it has been customary or the practice of courts to hold a joint hearing of both the ejectment and the cadastral cases in which the same parcel of land is litigated and to render a decision in both cases in its double role, as court of first instance of general jurisdiction and as cadastral court of limited jurisdiction.

The other question which might have been raised is whether the judgment rendered in the first case between the same parties, as reported in Volume 37, p. 865, of the Philippine Reports, bars the institution of the present action. In view of the fact that the defendants did not rely on that ground in their motion to dismiss, we do not deem it proper to take it up and pass upon it.

The order of dismissal appealed from is reversed, without pronouncement as to costs.

Ozaeta, Pablo, Bengzon, Tuason, Montemayor, and *Reyes, JJ.*, concur.

PADILLA *J.:*

I certify that Mr. Justice Torres voted for the reversal of the order appealed from.

Order reversed.

[No. L-1990. March 15, 1950]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* LEONILO GANAL ET AL., defendants. LEONILO GANAL, ARCADIO RAMOS (*alias* DOMINADOR RAMOS), and CASIMIRO CLEMENTE, appellants.

1. CRIMINAL LAW; ROBBERY WITH HOMICIDE AND RAPE; EVIDENCE; IDENTITY OF ACCUSED; MOONLIT NIGHT; UNCORROBORATED TESTIMONY OF VICTIM, WHEN SUFFICIENT.—An uncorroborated testimony of the victim as to the identity of the accused is con-

sidered sufficient when the witness had ample opportunity to recognize the accused unmistakably. The accused was well known to her and she knew his voice; there was light in the bedroom which the accused and his companions entered to rob; and it was a moonlit night. It was the accused who dragged her downstairs followed his two unrecognized companions in raping the witness, and then warned her not to reveal their identity on pain of death.

2. ID.; ID.; ID.; WITNESS; PREVARICATION.—When the last answer contradicts the previous answers of a witness, such situation evinces prevarication.

3. ID.; ID.; ID.; IDENTITY OF ACCUSED WHEN DOUBTFUL.—An uncorroborated testimony of the victim as to the identity of an accused which has been weakened by testimony of another witness, creates a doubt as to the accused's identity. Such doubt must necessarily be resolved in favor of the accused, it being preferable to acquit a guilty person rather than convict an innocent one.

4. ID.; ID.; RAPE AND BAND AS AGGRAVATING CIRCUMSTANCES.—The fact that the crime was committed by a band and was accompanied by rape must be considered as aggravating circumstances.

5. ID.; ID.; ANY MEMBER OF A BAND AS PRINCIPAL.—Any member of a band who is present in the commission of a robbery by the band shall be punished as principal of any of the assaults committed by the band, unless it be shown that he attempted to prevent it.

APPEAL from a judgment of the Court of First Instance of Isabela. Arranz, J.

The facts are stated in the opinion of the court.

Gregorio P. Formoso for appellants.

Solicitor General Felix Bautista Angelo and *Solicitor Ramon A. Avanceña* for appellee.

OZAETA, *J.:*

About 11 o'clock in the evening of March 7, 1947, in the barrio of Amistad, municipality of Angadanan, Isabela, various individuals armed with rifles and revolvers broke, into the house of the spouses Victoriano Vallejo and Primitiva Pagaduan. At that time the spouses and their six children were sleeping in the bedroom, and four other persons including Braulio Simon, granduncle of Primitiva Pagaduan, were sleeping in the *sala*. Both the bedroom and the *sala* were lighted by a kerosene lamp. The spouses, who got up startled by the intrusion, were ordered by the intruders to lie on the floor face down and then asked for their money. They told the robbers to look for it in the trunk (*baul*) located in the bedroom. The robbers ransacked the trunk and took ₱900 in cash, jewelry consisting of watches, rings, necklace, and earrings, and two blankets. The total value of the loot, including the cash, was ₱1,460.

Not content with the robbery, one of the robbers dragged Primitiva Pagaduan, 31, downstairs and handed her to two

other robbers, who took her to a rice field about 100 meters north of the house, where three of the robbers raped her one after another. The last one to rape her was the same robber who had dragged her down from the bedroom, and he warned her that should she reveal their identity she and all the members of her family would be killed. While the last rapist was performing the bestial act, Primitiva Pagaduan heard a gunshot somewhere near the house. The robbers fled immediately afterwards. Primitiva found her husband dead about 17 meters south of the stairway of the house. He had been shot through the head.

The crime was reported that same night to the nearest authority, the barrio lieutenant named Severiano Kasing, who lived about 400 meters from the scene of the crime and who early the following morning went there to investigate. Primitiva Pagaduan did not reveal to him the identity of the malefactors but told him that she did not recognize them. However, she asked the barrio lieutenant to send for the chief of police of Angadanan. When the latter came in the afternoon of March 8, Primitiva confided to him that she recognized six of the robbers who entered her room and who, according to her, were Leonilo Ganal, Arcadio Ramos, Casimiro Clemente, Venancio Nolasco, Mauro Nolasco, and Venancio Lagmay. She did not reveal to the chief of the police, Antonio Melad, that she had been raped because, she said, she was ashamed.

By order of the chief of police the body of Victoriano Vallejo was taken to the municipal building of Angadanan, where it was examined and embalmed by Dr. Eligio A. Montero. The following day, March 9, the family took the corpse to Tayug, Pangasinan, for burial.

A complaint for robbery in band with homicide was filed by the chief of police in the justice of the peace court of Angadanan on March 17, 1947, against the six persons named by Primitiva Pagaduan.

On March 16, 1947, since the robbers who were known to Primitiva Pagaduan and some of whom were residents of the same barrio of Amistad had not been arrested, Primitiva went to the town of Gamu, Isabela, and there reported to Lt. Artemio P. Bahia of the Constabulary that she could not return to her home in Amistad because Leonilo Ganal and his companions were still at large, Lieutenant Bahia accompanied Primitiva Pagaduan the following day to the barrio of Amistad, where he continued the investigation. She revealed to Lieutenant Bahia the same names of the six persons whom she said she recognized as the robbers. Upon being questioned by him as to what the robbers did to her after being dragged to the rice field, she revealed that she was raped by them one after another. On March 21 Lieutenant Bahia filed an amended complaint accusing the six persons above named of robbery

in band with homicide and rape. Of the six accused, only Leonilo Ganal, Arcadio Ramos, and Casimiro Clemente were apprehended, the other three—Mauro Nolasco, Venancio Nolasco, and Venancio Lagmay—having escaped and not having been arrested up to the time of the trial of this case.

The trial court found the said three accused guilty of robbery in band with homicide and rape and sentenced each of them to *reclusión perpetua* and to indemnify Primitiva Pagaduan in the amount of ₱1,460, the value of the articles and money stolen by the accused.

The appellants challenge the sufficiency of the evidence to prove their guilt.

The witnesses who testified as to the identity of the robbers were Primitiva Pagaduan, her granduncle Braulio Simon, and her 11-year-old daugther Eufegenia Vallejo. Primitiva Pagaduan swore that she was able to recognize six of the robbers, namely Leonilo Ganal, Arcadio Ramos, Casimiro Clemente, Venancio Nolasco, Mauro Nolasco, and Venancio Lagmay. Braulio Simon said that he was able to recognize only two of the robbers, namely, Mauro Nolasco and the cross-eyed man, pointing to the accused Arcadio Ramos. And Eufegenia Vallejo said that she recognized only Mauro Nolasco and Venancio Nolasco, both of whom were still at large.

We shall examine the proofs as to the identity of each of the three appellants.

1. *Leonilo Ganal.*—This appellant was well known to Primitiva Pagaduan because he resided in the barrio of Amistad, he being married to a niece of the barrio lieutenant, Severino Kasing, and because in 1946–1947 he cultivated as tenant a parcel of land belonging to the spouses Victoriano Vallejo and Primitiva Pagaduan. As a matter of fact he admitted having been to the house of said spouses several times before the crime in question was committed. Primitiva Pagaduan identified him as one of the six robbers who entered her bedroom on the night in question and as the one who dragged her downstairs and later raped her and warned her not to reveal his and his companions' identity on pain of death. She said that she did not recognize the two other robbers who raped her because each of them covered her face with his hat while raping her. Leonilo Ganal admitted during the trial that there was no enmity between him and Primitiva Pagaduan and that he knew of no reason or motive why she should testify falsely against him.

The fact that Primitiva Pagaduan did not reveal to barrio lieutenant Severiano Kasing the identity of any of the robbers including Leonilo Ganal was satisfactorily explained by her during the trial by saying that she feared that Leonilo Ganal and his companions might kill her and

the members of her family if she then and there revealed their identity. Besides, she did not feel free to denounce Leonilo Ganal to Severiano Kasing in view of the latter's relation of affinity to the former.

A perusal of the testimony of Primitiva Pagaduan convinces us of her sincerity and veracity. Besides, if she had no regard for the truth and intended to make a false accusation, she could have induced her 11-year-old daughter Eufegenia Vallejo and her granduncle Braulio Simon to corroborate her testimony that Leonilo Ganal was one of the robbers.

Although Primitiva Pagaduan's testimony as to the identity of Leonilo Ganal is uncorroborated, we believe with the trial court that it is sufficient. She had ample opportunity to recognize Leonilo Ganal unmistakably. Leonilo Ganal was well known to her. She knew his voice. There was light in the bedroom which Leonilo Ganal and his companions entered to rob, and it was a moonlit night. It was Leonilo Ganal who dragged her downstairs, followed his two unrecognized companions in raping her, and then warned her not to reveal their identity on pain of death.

We think the trial court did not err in not believing Leonilo Ganal's alibi. He said that on March 7, 1947, he was in the barrio of Nagrumbuan, Cauayan, Isabela, threshing palay from 7 o'clock in the morning up to midnight. It is certainly unusual for rice threshers to work continuously from early morning to midnight. He also said that he transferred to that barrio to live with his mother on March 6, 1947, the day before the crime in question was committed. Nevertheless he was arrested in the barrio of Amistad while he was playing blackjack in the house of one Alberto de Jesus. He testified on cross-examination that in May, 1946, he talked to Primitiva Pagaduan regarding his tilling of her land.

"Q. And you talked to her *in her house*, is not that a fact?—A. *Yes sir.*

"Q. You are familiar in (with) the house because you have been there for many days. Is it not?—A. *Yes sir.*

"Q. You know that that house has one room and also has one sala. Is it not?—A. I never went up the house of Primitiva Pagaduan, I only reached the yard of the house." (Pages 365–366, t. s. n.)

The last number contradicts the previous answers and to our mind evinces prevarication. Why should he lie about knowing that the house of the victim has one room and one *sala?* He was evidently afraid to admit the truth lest he exposed his guilt.

We are convinced by the evidence of this appellant's guilt.

2. *Arcadio Ramos, alias Dominador Ramos.*—This appellant is also well known to Primitiva Pagaduan because he

is married to the sister of the wife of an uncle of hers named Mariano Simon. He was positively identified by Primitiva Pagaduan as one of the robbers who entered her bedroom on the night in question. Braulio Simon, the granduncle of Primitiva Pagaduan who was her visitor on the night in question and who slept in the *sala*, also identified Arcadio Ramos as the one who pointed a revolver at him while Mauro Nolasco held him down by the neck. Although at that time Braulio Simon did not know Arcadio Ramos' name, he said he recognized him by face and that he is cross-eyed. No reason is suggested by this appellant why Primitiva Pagaduan and Braulio Simon should testify falsely against him.

The testimony of this appellant in his defense is patently unbelievable. He said that he did not know Victoriano Vallejo and had not even heard of his name before March 7, 1947. He also said that he did not know Primitiva Pagaduan. He even denied having heard the news of the killing of Primitiva Pagaduan's husband. When he was arrested by the constabulary on March 20, 1947, he gave his name as Dominador Ramos and not Arcadio Ramos, and during the trial he insisted that his name was Dominador Ramos, although at the beginning when he was asked to state his name and other personal circumstances he replied: "Arcadio Ramos, 42 years of age, married, farmer, residing in the barrio of Pinoma, Cauayan, Isabela." He admitted on cross-examination that when the interpreter called the name Arcadio Ramos he responded to that name, and that when Braulio Simon pointed to him the interpreter asked his name and he answered, "Arcadio Ramos." He testified that on March 7, 1947, he did not leave his house because he was taking care of his wife, who was then complaining of headache.

In view of the apparent insincerity of the testimony of this appellant, on the one hand, and of his positive identification by the witnesses Primitiva Pagaduan and Braulio Simon as one of the robbers, on the other, we believe the trial court did not err in finding him guilty.

3. *Casimiro Clemente.*—This appellant was identified by Primitiva Pagaduan as one of the six robbers who entered her bedroom on the night in question. Her testimony, however, as to this appellant is debilitated by that of Eduardo A. Abesamis, justice of the peace of Angadanan, who testified that on Sunday, March 9, 1947, he met Primitiva Pagaduan in Echague, Isabela, on her way to Tayug, Pangasinan, to bury her deceased husband, and that he then and there took the opportunity to ask her how her husband was killed, and that she told him that he was killed by robbers; "that there were six of them and among those six she said she recognized four of them"; that Casimiro Clemente was not mentioned by Primitiva Paga-

duan as one of the robbers; that she mentioned Leonilo Ganal, Arcadio Ramos, and the two Nolascos; that she also did not mention the name of Venancio Lagmay (one of those still at large).

In view of the fact that when Primitiva Pagaduan was called as a witness in rebuttal she was not asked to comment on the testimony of Justice of the Peace Abesamis, that testimony remains uncontradicted. Hence there is no explanation from her as to why she failed to mention to the justice of the peace the name of Casimiro Clemente as one of the robbers. There is a possibility that she was not very positive as to this appellant's identity. Her testimony on this point being uncorroborated, and having been weakened by that of the justice of the peace, we entertain doubt as to the sufficiency or the proof of this appellant's identity. Such doubt must necessarily be resolved in favor of the accused, it being preferable to acquit a guilty person rather than convict an innocent one.

It results from the foregoing that the appellants Leonilo Ganal and Arcadio Ramos are guilty, while the appellant Casimiro Clemente is entitled to an acquittal on reasonable doubt.

The crime committed is robbery with homicide and rape. Robbery with homicide is punished by paragraph 1 of article 294 of the Revised Penal Code with *reclusión perpetua* to death. The fact that the crime was committed by a band and was accompanied by rape must be considered as aggravating circumstances. Under the second paragraph of article 296, any member of a band who is present in the commission of a robbery by the band shall be punished as principal of any of the assaults committed by the band, unless it be shown that he attempted to prevent it. The appellants Ganal and Ramos must therefore be punished as principals of the crime of robbery with homicide. The penalty should be imposed in the maximum degree, but in view of the lack of sufficient votes to impose the death penalty, we are constrained to affirm the penalty of life imprisonment imposed by the trial court. The trial court, however, erred in not sentencing the appellants to pay indemnities for the killing of Victoriano Vallejo and the rape of his wife.

Wherefore, the sentence of the trial court is modified as follows: Leonilo Ganal and Arcadio Ramos, *alias* Dominador Ramos, shall suffer *reclusión perpetua,* shall jointly and severally indemnify the heirs of the deceased Victoriano Vallejo in the sum of ₱6,000 for the homicide and Primitiva Pagaduan in the sum of ₱4,000 for the rape plus the sum of ₱1,460 as the value of the stolen articles, and shall each pay one-third of the costs.

The appellant Casimiro Clemente is acquitted on reasonable doubt, with one-third of the costs *de oficio*.

Moran, C. J., Pablo, Bengzon, Padilla, Tuason, Montemayor, and *Reyes, JJ.*, concur.

Judgment modified as to Ganal and Ramos and reversed as to Clemente.

[No. L-2809. March 22, 1950]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* FRISCO HOLGADO, defendant and appellant

1. CRIMINAL PROCEDURE, RULES OF; QUALIFIED PLEA OF GUILTY; AMBIGUOUS INFORMATION; ACCUSED WITHOUT COUNSEL; IMPOSITION OF HEAVY PENALTY.—When an accused unaided by counsel qualifiedly admits his guilt to an ambiguous or vague information from which a serious crime can be deduced, it is not prudent for the trial court to render a serious judgment finding the accused guilty of a capital offense without absolutely any evidence to determine and clarify the true facts of the case.
2. ID.; DUTIES OF COURT WHEN DEFENDANT APPEARS WITHOUT ATTORNEY.—Under the provision of section 3 of Rule 112 of the Rules of Court, when a defendant appears without attorney, the court has four important duties to comply with: (1) It must inform the defendant that it is his right to have attorney before being arraigned; (2) after giving him such information the court must ask him if he desires the aid of an attorney; (3) if he desires and is unable to employ attorney, the court must assign attorney *de oficio* to defend him; and (4) if the accused desires to procure an attorney of his own the court must grant him a reasonable time therefor.
3. ID.; DUE PROCESS OF LAW; RIGHT OF ACCUSED TO BE REPRESENTED BY COUNSEL IS CONSTITUTIONAL.—One of the great principles of justice guaranteed by our Constitution is that "no person shall be held to answer for a criminal offense without due process of law," and that all accused "shall enjoy the right to be heard by himself and counsel." In criminal cases there can be no fair hearing unless the accused be given an opportunity to be heard by counsel. The right to be heard would be of little avail if it does not include the right to be heard by counsel. Even the most intelligent or educated man may have no skill in the science of the law, particularly in the rules of procedure, and, without counsel, he may be convicted not because he is guilty but because he does not know how to establish his innocence. And this can happen more easily to persons who are ignorant or uneducated. It is for this reason that the right to be assisted by counsel is deemed so important that it has become a constitutional right and it is so implemented that under our rules of procedure it is not enough for the court to apprise an accused of his right to have an attorney, it is not enough to ask him whether he desires the aid of an attorney, but it is essential that the court should assign one *de oficio* for him if he so desires and he is poor or grant him a reasonable time to procure an attorney of his own.

APPEAL from a judgment of the Court of First Instance of Romblon. Ramos, J.

The facts are stated in the opinion of the court.

Mauricio Carlos for appellant.

Assistant Solicitor General Manuel P. Barcelona and *Solicitor Felix V. Makasiar* for appellee.

MORAN, *C. J.*:

Appellant Frisco Holgado was charged in the Court of First Instance of Romblon with slight illegal detention because according to the information, being a private person, he did "feloniously and without justifiable motive, kidnap and detain one Artemia Fabreag in the house of Antero Holgado for about eight hours thereby depriving said Artemia Fabreag of her personal liberty."

On May 8, 1948, the day set for the trial, the trial court proceeded as follows:

"Court:

"Is this case ready for trial?

"Fiscal:

"I am ready, your honor.

"Court:—to the accused.

"Q. Do you have an attorney or are you going to plead guilty?—A. I have no lawyer and I will plead guilty.

"Court:

Arraign the accused.

"Note:

"Interpreter read the information to the accused in the local dialect after which he was asked this question.

"Q. What do you plead?—A. I plead guilty, but I was instructed by one Mr. Ocampo.

"Q. Who is that Mr. Ocampo, what is his complete name?—A. Mr. Numeriano Ocampo.

"The provincial fiscal is hereby ordered to investigate that man.

"Fiscal:

"I have investigated this case and found out that this Ocampo has nothing to do with this case and I found no evidence against this Ocampo.

"Court:

"Sentence reserved."

Two days later, or on May 10, 1948, the trial court rendered the following judgment:

"[Criminal Case No. V–118]

"THE PEOPLE OF THE PHILIPPINES, plaintiff-appellee, *vs.* FRISCO HOLGADO defendant-appellant

"SLIGHT ILLEGAL DETENTION

"SENTENCE

"The accused, Frisco Holgado, stands charged with the crime of kidnapping and serious illegal detention in the following

"INFORMATION

"That on or about December 11, 1947, in the municipality of Concepcion, Province of Romblon, Philippines, and within the jurisdiction of this Honorable Court, the said accused being a private individual, did then and there wilfully, unlawfully and feloniously, and without justifiable motive, kidnap and detain one Artemia Fabreag in the house of Antero Holgado for about 8 hours thereby depriving said Artemia Fabreag of her personal liberty.

"Contrary to Law.

"This case is called for trial on May 8, 1948. Upon arraignment the accused pleaded guilty to the information above described.

"The offense committed by the accused is kidnapping and serious illegal detention as defined by article 267 of the Revised Penal Code as amended by section 2 of Republic Act No. 18 and punished by reclusion temporal in its minimum period to death. Applying indeterminate sentence law the penalty shall be prision mayor in its maximum degree to reclusion temporal in the medium degree, as minimum, or ten (10) years and one (1) day of prision mayor to twenty (20) years, with the accessory penalties ponded for by law, with costs. The accused is entitled to one-half of his preventive imprisonment."

It must be noticed that in the caption of the case as it appears in the judgment above quoted, the offense charged is named SLIGHT ILLEGAL DETENTION while in the body of the judgment it is said that the accused "stands charged with the crime of kidnapping and serious illegal detention." In the information filed by the provincial fiscal it is said that he "accuses Frisco Holgado of the crime of "slight illegal detention." The facts alleged in said information are not clear as to whether the offense charged is merely "slight illegal detention" as the offense is named therein or the capital offense of "kidnapping and serious illegal detention" as found by the trial judge in his judgment. Since the accused-appellant pleaded guilty and no evidence appears to have been presented by either party, the trial judge must have deduced the capital offense from the facts pleaded in the information.

Under the circumstances, particularly the qualified plea given by the accused, who was unaided by counsel, it was not prudent, to say the least, for the trial court to render such a serious judgment finding the accused guilty of a capital offense, and imposing upon him such a heavy penalty as ten years and one day of *prisión mayor* to twenty years, without absolutely any evidence to determine and clarify the true facts of the case.

The proceedings in the trial court are irregular from the beginning. It is expressly provided in our Rules of Court, Rule 112, section 3, that:

"If the defendant appears without attorney, he must be informed by the court that it is his right to have attorney before being arraigned, and must be asked if he desires the aid of attorney. If he desires and is unable to employ attorney, the Court must assign attorney *de oficio* to defend him. A reasonable time must be allowed for procuring attorney."

Under this provision, when a defendant appears without attorney, the court has four important duties to comply with: 1—It must inform the defendant that it is his right to have attorney before being arraigned; 2—After giving him such information the court must ask him if he desires the aid of an attorney; 3—If he desires and is unable to employ attorney, the court must assign attorney *de oficio* to defend him; and 4—If the accused desires to procure an

attorney of his own the court must grant him a reasonable time therefor.

Not one of these duties had been complied with by the trial court. The record discloses that said court did not inform the accused of his right to have an attorney nor did it ask him if he desired the aid of one. The trial court failed to inquire whether or not the accused was to employ an attorney, to grant him reasonable time to procure one or to assign an attorney *de oficio*. The question asked by the court to the accused was "Do you have an attorney or are you going to plead guilty?" Not only did such a question fail to inform the accused that it was his right to have an attorney before arraignment, but, what is worse, the question was so framed that it could have been construed by the accused as a suggestion from the court that he plead guilty if he had no attorney. And this is a denial of fair hearing in violation of the due process clause contained in our Constitution.

One of the great principles of justice guaranteed by our Constitution is that "no person shall be held to answer for a criminal offense without due process of law", and that all accused "shall enjoy the right to be heard by himself and counsel." In criminal cases there can be no fair hearing unless the accused be given an opportunity to be heard by counsel. The right to be heard would be of little avail if it does not include the right to be heard by counsel. Even the most intelligent or educated man may have no skill in the science of the law, particularly in the rules of procedure, and, without counsel, he may be convicted not because he is guilty but because he does not know how to establish his innocence. And this can happen more easily to persons who are ignorant or uneducated. It is for this reason that the right to be assisted by counsel is deemed so important that it has become a constitutional right and it is so implemented that under our rules of procedure it is not enough for the Court to apprise an accused of his right to have an attorney, it is not enough to ask him whether he desires the aid of an attorney, but it is essential that the court should assign one *de oficio* for him if he so desires and he is poor or grant him a reasonable time to procure an attorney of his own.

It must be added, in the instant case, that the accused who was unaided by counsel pleaded guilty but with the following qualification: "but I was instructed by one Mr. Ocampo." The trial court failed to inquire as to the true import of this qualification. The record does not show whether the supposed instruction was real and whether it had reference to the commission of the offense or to the making of the plea of guilty. No investigation was opened by the court on this matter in the presence of the accused and there is now no way of determining whether the supposed instruction is a good defense or may vitiate the volun-

tariness of the confession. Apparently the court became satisfied with the fiscal's information that he had investigated Mr. Ocampo and found that the same had nothing to do with this case. Such attitude of the court was wrong for the simple reason that a mere statement of the fiscal was not sufficient to overcome a qualified plea of the accused. But above all, the court should have seen to it that the accused be assisted by counsel specially because of the qualified plea given by him and the seriousness of the offense found to be capital by the court.

The judgment appealed from is reversed and the case is remanded to the Court below for a new arraignment and a new trial after the accused is apprised of his right to have and to be assisted by counsel. So ordered.

Ozaeta, Pablo, Bengzon, Padilla, Tuason, Montemayor, and *Reyes, JJ.,* concur.

Judgment reversed and case remanded for new arraignment and a new trial.

[No. L-3022. March 22, 1950]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* PEDRO CABASA and IGNACIO AJOS, defendants and appellants.

CRIMINAL LAW; MURDER; EXEMPTING CIRCUMSTANCE; IMPULSE OF UNCONTROLLABLE FEAR SHOULD BE ALLEGED AND PROVED.—Fear, as provided in section 6 of article 12 of the Revised Penal Code, being entirely personal and a matter of defense, lying within the peculiar knowledge of the subject, should be alleged and proved to the satisfaction of the court by the accused if he is to avail himself of such exempting circumstance.

APPEAL from a judgment of the Court of First Instance of Davao. Fernandez, J.

The facts are stated in the opinion of the court.

Quijano, Rosete & Tizon for appellant Cabasa.

Jose Agbulos for appellant Ajos.

Solicitor General Felix Bautista Angelo and *Solicitor Felix V. Makasiar* for appellee.

TUASON, *J.:*

On October 22, 1944, Aurelio Saavedra was hauled away from his house, situated at barrio Tamban, municipal district of Surup, province of Davao, by appellant Ignacio Ajos, Gil Castillo and one Luis Dugcoy, each armed with a rifle or carbine. A few kilometers from Saavedra's house, Saavedra was shot and killed by Ajos. Ajos was a member of a guerrilla unit under the command of his co-defendant Pedro Cabasa, also an appellant, who was a first class private in the organization.

The theory of the prosecution is that Ajos, the leader of the trio, received an order from Cabasa to kill Saavedra

at sitio Mugdog. The theory of the defense is that Cabasa's order was only to arrest Saavedra and bring him to Cabasa for investigation in connection with his alleged collaboration with the Japanese; that on the way back to the guerrilla camp or headquarters, Saavedra tried to wrest his captors' weapons and failing in his attempt, started to flee; that it was while Saavedra was running away that Ajos fired at and killed him. The accused denied Castillo was a guerrilla. They said he was a prisoner and was sent to go along with Ajos and Dugcoy only because neither of these knew the place.

Around the issues thus joined revolves the evidence for both sides. As these issues involve the relative credibility of the witnesses we deem it convenient to extract the pertinent parts of their testimony.

Gil Castillo testified substantially as follows: He was a guerrilla under Pedro Cabasa. On October 22, 1944, Cabasa told Ajos to go to Tamban with the witness and Dugcoy, to get Aurelio Saavedra and shoot him upon arrival at sitio Mugdog. Thereupon Ajos with Luis Dugcoy and witness made for Saavedra's barrio. Ajos was armed with a carbine, Dugcoy and the witness with rifles. Ajos' carbine was lent to him by Cabasa, who told Ajos to use that weapon instead of Ajos' rifle. Upon reaching Saavedra's place, Ajos told Saavedra that Cabasa sent for him because he was to be taken to the east coast. Irene Medel, Saavedra's common-law wife, and her children were in the house besides Saavedra. Saavedra willingly followed Ajos and his companions and at a distance of about 100 meters from Saavedra's house, Ajos bound Saavedra's hands behind his back with a rope while Dugcoy pointed his gun at him. Once thus tied, Saavedra was taken to Mugdog, about three kilometers distant from Saavedra's house, and there Ajos and Dugcoy led Saavedra to a bush against Saavedra's protest. In the bush, Ajos told Saavedra, "I am going to shoot you." As Saavedra and the witness know each other, the former begged Castillo to help him, but he replied that he could not do anything since he was only a private. Saavedra was immediately shot by Ajos from a distance of four meters and dropped dead. As Ajos was going to fire another shot the witness prevailed upon him not to do so. Ajos and his two companions covered Saavedra's dead body with small twigs, stones and woods. Afterward the trio returned to the barracks where Ajos reported to the detachment commander, Cabasa, that his order had been accomplished. Cabasa warned them to keep quiet.

Against Gil Castillo's testimony, Ignacio Ajos in substance stated as follows: He was under Pedro Cabasa. On October 22, 1944, he, Gil Castillo and Luis Dugcoy were commanded at the camp by Pedro Cabasa to arrest Saavedra. When Cabasa gave the order, Gil Castillo was down-

stairs, only Luis Dugcoy being present besides himself. As he told Cabasa that he did not know the place where Saavedra lived, Cabasa called for Gil Castillo who was then feeding the hogs downstairs. Cabasa told Castillo to go with the witness and Luis Dugcoy and show them Saavedra's house. The order of Cabasa was for Ajos to bring Saavedra to the camp. Cabasa did not tell him to kill Saavedra or to tie Saavedra's hands. They arrived at Saavedra's house at about 2 o'clock p. m. Saavedra upon being appraised of the order of arrest which Ajos read to him expressed his willingness to come along, which he did. It was about 3:50 o'clock p. m. when they left Saavedra's place. They were walking in a file, Dugcoy going ahead, Aurelio following Dugcoy, then Gil Castillo and then Ajos, who was suffering from a sore foot. All of a sudden Ajos heard a call for help from Castillo "because Luis was being grabbed by Aurelio." Ajos fired twice in the air in order to warn Saavedra to stop from his attempt to seize Dugcoy's gun. Saavedra did not succeed in his attempt because Luis' gun was slung on his shoulder and fell to the ground. Failing to grab Dugcoy's gun, Saavedra started to flee and Ajos fired at him. The shot found its mark, Saavedra was killed and buried in the same place. Gil Castillo had a gun but no ammunition because he was a prisoner. He had been arrested by Pedro Cabasa at Nangan. He was at the camp as prisoners. At the camp the witness reported what happened to Cabasa.

Pedro Cabasa testified that he was a recognized guerrilla. On or about October 22, 1944, his camp was located in Luzon, Surup, Davao. He was the detachment commander of that unit. Luis Dugcoy and Ignacio Ajos were his soldiers. On the date above mentioned, he gave an order to Ignacio Ajos and Luis Dugcoy for the apprehension of Aurelio Saavedra in Tamban. Gil Castillo was not present when he gave the order; Castillo was downstairs feeding the hogs. He ordered the arrest of Saavedra for his pro-Japanese activities. Because, according to Dugcoy, he did not know the place where Saavedra lived, he got Gil Castillo to guide Ajos and Dugcoy. He called the testimony of Castillo about his alleged order to shoot Saavedra "as false and frame-up." He said Castillo and his two brothers had been caught in September, 1944, in Nangan where the brothers were under the command of Estrella, municipal chief of police of the puppet government in Surup. That was how Gil Castillo became his prisoner. He also denied that he ordered Ajos to tie Aurelio Saavedra. He admitted having given Castillo a gun but said there was no ammunition. He said he did this "as a military tactics, to give attraction to certain people to surrender to my camp." Saavedra, he said, did not reach the camp because, according to Ajos, at Lilisan Saavedra

grabbed the rifle of Luis Dugcoy, and Castillo shouted for help, upon which Ajos shot into the air while Luis and Saavedra were grappling for the possession of the gun.

Luis Dugcoy did not testify. Neither was he prosecuted.

It is clear in our mind that Aurelio Saavedra was killed by Ajos in the manner and under the circumstances related by Gil Castillo. That Saavedra's hands or arms were securely bound was affirmed not only by Castillo but also by Irene Medel, Saavedra's mistress. That was in fact the most natural step for Ajos and his companions to take as a simple matter of precaution. With his hands shackled and with three armed men to contend with, it was unthinkable that Saavedra would dare escape or snatch the guns of his captors. We are also convinced that Gil Castillo himself was a guerrilla and was provided with ammunition as well as Ajos and Dugcoy. That he was armed with a rifle seems to be a conclusive refutation of the assertion that he was a prisoner. Cabasa's and Ajos' explanations for Castillo's possession of a gun sound foolish.

What was Cabasa's role in the slaying of Saavedra? It has been seen that Cabasa, although admitting that he ordered Saavedra's arrest denied that he told Ajos to kill the now deceased. But we are inclined to give credence in Castillo's testimony, and so is Ajos, counsel in this instance. Gil Castillo was direct and positive in his statement that an order to do away with Saavedra was given by Cabasa. The very fact that Saavedra was killed on the way to the camp is a good corroboration of Castillo's testimony. For it is hard to conceive that Ajos would have slain his prisoner if his instruction had been to take Saavedra for investigation, unless we should accept the discredited version that Saavedra made a dash for freedom. A mere private, obedient and meek, Ajos had no reason of his own to kill the deceased. According to the court, Ajos was of humble disposition, lacking education but inclined to obey blindly the orders of his superiors.

Unlike Ajos, Cabasa had a motive to liquidate Saavedra. Cabasa had been jilted by Irene Medel, Saavedra's common-law wife. According to the latter, a Spanish mestiza married to another man but cohabiting with Saavedra, about one week before October 22, 1944, Pedro Cabasa while walking past her house on patrol with men of his unit, saw her, came up, embraced her, and tried to kiss her. At that time she was alone with her children, Saavedra being away. She screamed for help and only then did Cabasa release her and get off the house. She said he made love to her but she protested that she was married.

The theory that Cabasa should have Saavedra killed for his rebuff by Irene Medel might sound unreasonable and appear out of proportion to Irene's "impudence." But Saavedra's assassination could have been conceived with

a triple objective: to inflict moral suffering on the woman herself and deprive her of material support, and, in possible expectation of a new approach to win her, to put Saavedra out of the way and to warn the woman of his power of retribution. Cabasa was a man who, it would seem, would stop at nothing to attain his end. Supreme within his territory, it appeared that this accused was arrogant, vindictive, brutal, intolerant of any opposition or disobedience. In Exhibit D, Castillo's affidavit which was admitted in evidence without objection and which Ajos' counsel quoted in his brief, the affiant thus described this appellant:

"He was a little king in our place, and I don't know of any person who could dare oppose him or disobey him while he was here in our place. How many cows and pigs were killed or ordered killed by him? The owners could not oppose him because they were afraid of him. If these big people were afraid of him, with more reasons that I should be afraid because I am only a poor man. * * * During Cabasa's time here he could do what he pleased. Do you not know, sir, that Cabasa also killed three persons in the house of the Russian in Mugdog? After killing these three men in Mugdog, nothing happened to him; he could still return here with his carbine, and all the people were afraid. * * * One Venancio (Monobo) of Malipugi, Tibinwan, Surup, for wasting only one bullet, he was tied to a coconut tree in the heat of the sun, by Cabasa; he was also butt-struck by Cabasa while tied; Julio Antolin, barrio lieutenant of Langa, Surup, was also tied in the heat of the sun to a tree and butt-struck by him because the former did not give the latter chickens and eggs; and because he was not given chickens and eggs, he was accused by Cabasa of being a pro-Japanese; all other persons who would refuse him rice, clothing, chickens and other foodstuffs he would say to them that they were Japanese spies or pro-Japanese; one Catalino Sajulla of Sigaboy, who was only explaining to Cabasa as to what would happen to the houses if burned after evacuating them, Cabasa harshly and at once pointed his gun at Sajulla, telling him he was a spy of the Japanese; and lastly his soldier, Martin Malintad for failing to bring him foodstuffs which he ordered the former to commandeer, was also butt-struck by him, and threatened him to shoot him should he again fail to comply with his orders."

That Cabasa did not molest the woman after her husband had been slain does not destroy the validity or our surmise; his desistence may well have been due to change of mind or other causes arising after the murder.

Counsel for Ajos concluded from Cabasa's character that Ajos feared and blindly obeyed his chief and that when Cabasa gave him his carbine to murder Saavedra, he must have obeyed under the impression that if he did not he himself would be shot. Ajos thus acted, it is argued, under the impulse of uncontrollable fear and should be freed from penal responsibility under section 6 of article 12 of the Revised Penal Code.

The trouble with this plea is that it is not founded on any claim by Ajos himself. Ajos made absolutely no reference to the fact that he acted under duress or under the impulse of an uncontrollable fear for his life or safety.

Fear, being entirely personal and a matter of defense, lying within the peculiar knowledge of the subject, should be alleged and proved to the satisfaction of the court by the accused. For the rest, Ajos killed Saavedra without the presence of Cabasa and could very well have disregarded Cabasa's order without imminent danger of being subjected to punishment for his disobedience. He was not under physical or moral compulsion to return to the camp.

The defendants undertook to establish that Aurelio Saavedra was a Japanese spy and that his arrest was motivated by his collaboration with the enemy. Cabasa testified that on November 20, 1943, he and his men were attacked in the schoolhouse in barrio Luzon by fifty Constabulary soldiers armed with rifles and guided by Saavedra. Pedro Fabian was sworn to declare that in compliance with an order of the guerilla commander he hunted pigs north of Mugdog the first week of November, 1943; that as it rained, he took shelter and spent the night in the house of one Alejandra Palma Gil; that early the next day he was arrested in that house by the constabulary and saw Saavedra leaning against a tree, a short distance from the constabulary soldiers. Cabasa added that in September, 1944, two members of the constabulary were captured by the guerrillas and in the course of the investigation admitted that Saavedra had been the guide of the constabulary when they assaulted the guerrillas in November, 1943.

The lower court did not give credence to Cabasa's and Fabian's testimony. It observed that Fabian was Irene Medel's lawful husband and naturally disliked Saavedra. The court also observed that for one year nothing was done against Saavedra and that it was only shortly after Irene Medel had rejected Cabasa's advances that Saavedra was apprehended and killed. Moreover Fabian's testimony was contradicted by Nicolas Gloshenkho who, testifying in rebuttal, stated positively that it was the son of his servant who led the constabulary to the house of Alejandra Palma Gil where Fabian was arrested.

The trial court found both accused guilty of murder and sentenced Cabasa to an indeterminate penalty of from 6 years and 1 day of *prisión mayor* to 12 years and one day of *reclusión temporal*, and Ignacio Ajos to an indeterminate penalty of from 4 years, 2 months and 1 day of *prisión correccional* to 10 years and 1 day of *prisión mayor* (sic), both to indemnify jointly and severally the heirs of Aurelio Saavedra in the sum of ₱2,000, with subsidiary imprisonment in case of insolvency, and to pay proportionate shares of the costs.

The crime committed is murder qualified by treachery. Neither mitigating nor aggravating circumstances attended the commission of the offense with respect to Cabasa, but the extenuating circumstance of lack of instruction is to

be appreciated in favor of Ajos with no aggravating circumstance to compensate it. Cabasa will therefore be sentenced to *reclusión perpetua* with the corresponding accessories and Ajos to an indeterminate penalty of from 12 years and 1 day to 20 years of *prisión correccional*, also with accessories of law, both to pay the heirs of the deceased, jointly and severally, ₱6,000 as indemnity, and each to pay one-half of the costs of both instances. It is so ordered.

Moran, C. J., Ozaeta, Pablo, Bengzon, Padilla, Montemayor, Reyes, and *Torres, JJ.*, concur.

Judgment modified.

[No. L–3580. March 22, 1950]

CONRADO MELO, petitioner and appellant, *vs.* THE PEOPLE OF THE PHILIPPINES and THE COURT OF FIRST INSTANCE OF RIZAL, respondents and appellees.

1. CRIMINAL PROCEDURE, RULES OF; DOUBLE JEOPARDY; THE SAME OR IDENTICAL OFFENSE.—One who has been charged with an offense cannot be again charged with the same or identical offense though the latter be lesser or greater than the former. "As the Government cannot begin with the highest, and then go down step by step, bringing the man into jeopardy for every dereliction included therein, neither can it begin with the lowest and ascend to the highest with precisely the same result."
2. ID.; ID.; SECOND OFFENSE NOT IN EXISTENCE; RULE OF IDENTITY OF OFFENSE DOES NOT APPLY.—The rule of identity does not apply, however, when the second offense was not in existence at the time of the first prosecution, for the simple reason that in such case there is no possibility for the accused, during the first prosecution, to be convicted for an offense that was then inexistent. Thus, where the accused was charged with physical injuries and after conviction the injured person dies, the charge for homicide against the same accused does not put him twice in jeopardy.
3. ID.; ID.; ID.; ID.—"Where after the first prosecution a new fact supervenes for which the defendant is responsible, which changes the character of the offense and, together with the facts existing at the time, constitutes a new and distinct offense" (15 Am. Jur., 66), the accused cannot be said to be in second jeopardy if indicted for the new offense.
4. ID.; ID.; "STARE DECISIS"; FORMER PRECEDENTS OVERRULED.—The ruling laid down in People *vs.* Tarok (73 Phil., 260), as followed in People *vs.* Villasis, G. R. No. L–1218, promulgated September 15, 1948 (Supp. to Off. Gaz., January, 1950, Vol. 46, No. 1, p. 268), is expressly repealed. Such ruling is not only contrary to the real meaning of "double jeopardy" as intended by the Constitution and by the Rules of Court but is also obnoxious to the administration of justice.

ORIGINAL ACTION in the Supreme Court. Prohibition.

The facts are stated in the opinion of the court.

Jose A. Fojas for petitioner.

First Assistant Solicitor General Roberto A. Gianzon and *Solicitor Martiniano P. Vivo* for respondents.

MORAN, *C. J.*:

Petitioner Conrado Melo was charged in the Court of First Instance of Rizal, on December 27, 1949, with frustrated homicide, for having allegedly inflicted upon Benjamin Obillo, with a kitchen knife and with intent to kill, several serious wounds on different parts of the body, requiring medical attendance for a period of more than 30 days, and incapacitating him from performing his habitual labor for the same period of time. On December 29, 1949, at eight o'clock in the morning, the accused pleaded not guilty to the offense charged, and at 10:15 in the evening of the same day Benjamin Obillo died from his wounds. Evidence of death was available to the prosecution only on January 3, 1950, and on the following day, January 4, 1950, an amended information was filed charging the accused with consummated homicide. The accused filed a motion to quash the amended information alleging double jeopardy, motion that was denied by the respondent court; hence, the instant petition for prohibition to enjoin the respondent court from further entertaining the amended information.

Brushing aside technicalities of procedure and going into the substance of the issues raised, it may readily be stated that the amended information was rightly allowed to stand. Rule 106, section 13, 2d paragraph, is as follows:

"If it appears at any time before judgment that a mistake has been made in charging the proper offense, the court may dismiss the original complaint or information and order the filing of a new one charging the proper offense, provided the defendant would not be placed thereby in double jeopardy, and may also require the witnesses to give bail for their appearance at the trial."

Under this provision, it was proper for the court to dismiss the first information and order the filing of a new one for the reason that the proper offense was not charged in the former and the latter did not place the accused in a second jeopardy for the same or identical offense.

"No person shall be twice put in jeopardy of punishment for the same offense," according to Article III, section 1 (20) of our Constitution. The rule of "double jeopardy" had a settled meaning in this jurisdiction at the time our Constitution was promulgated. It meant that when a person is charged with an offense and the case is terminated either by acquittal or conviction or in any other manner without the consent of the accused, the latter cannot again be charged with the same or identical offense. This principle is founded upon the law of reason, justice and conscience. It is embodied in the maxim of the civil law *non bis in idem*, in the common law of England, and undoubtedly in every system of jurisprudence, and instead of having specific origin it simply always existed. It found expression in the Spanish law and in the Constitution of the

United States and is now embodied in our own Constitution as one of the fundamental rights of the citizens.

It must be noticed that the protection of the Constitutional inhibition is against a second jeopardy for the *same offense,* the only exception being, as stated in the same Constitution, that "if an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the *same act.*" The phrase *same offense,* under the general rule, has always been construed to mean not only that the second offense charged is exactly the same as the one alleged in the first information, but also that the two offenses are identical. There is identity between the two offenses when the evidence to support a conviction for one offense would be sufficient to warrant a conviction for the other. This so-called "same-evidence test" which was found to be vague and deficient, was restated by the Rules of Court in a clearer and more accurate form. Under said Rules there is identity between two offenses not only when the second offense is exactly the same as the first, but also when the second offense is an attempt to commit the first or a frustration thereof, or when it necessarily includes or is necessarily included in the offense charged in the first information. (Rule 113, sec. 9; U. S. *vs.* Lim Suco, 11 Phil., 484; U. S. *vs.* Ledesma, 29 Phil., 431; People *vs.* Martinez, 55 Phil., 6.) In this connection, an offense may be said to necessarily include another when some of the essential ingredients of the former as alleged in the information constitute the latter. And vice-versa, an offense may be said to be necessarily included in another when all the ingredients of the former constitute a part of the elements constituting the latter (Rule 116, sec. 5.) In other words, one who has been charged with an offense cannot be again charged with the same or identical offense though the latter be lesser or greater than the former. "As the Government cannot begin with the highest, and then go down step by step, bringing the man into jeopardy for every dereliction included therein, neither can it begin with the lowest and ascend to the highest with precisely the same result." (People *vs.* Cox, 107 Mich., 435, quoted with approval in U. S. *vs.* Lim Suco, 11, Phil., 484; *see* also U. S. *vs.* Ledesma, 29 Phil., 431 and People *vs.* Martinez, 55 Phil., 6, 10.)

This rule of identity does not apply, however, when the second offense was not in existence at the time of the first prosecution, for the simple reason that in such case there is no possibility for the accused, during the first prosecution, to be convicted for an offense that was then inexistent. Thus, where the accused was charged with physical injuries and after conviction the injured person dies, the charge for homicide against the same accused does not put him twice

in jeopardy. This is the ruling laid down by the Supreme Court of the United States in the Philippine case of Diaz *vs.* U. S., 223 U. S., 442, followed by this Court in People *vs.* Espino, G. R. No. 46123, 69 Phil., 471, and these two cases are similar to the instant case. Stating it in another form, the rule is that "where after the first prosecution a new fact supervenes for which the defendant is responsible, which changes the character of the offense and, together with the facts existing at the time, constitutes a new and distinct offense" (15 Am. Jur., 66), the accused cannot be said to be in second jeopardy if indicted for the new offense.

This is the meaning of "double jeopardy" as intended by our Constitution for it was the one prevailing in the jurisdiction at the time the Constitution was promulgated, and no other meaning could have been intended by our Rules of Court.

Accordingly, an offense may be said to necessarily include or to be necessarily included in another offense, for the purpose of determining the existence of double jeopardy, when both offenses were in existence during the pendency of the first prosecution, for otherwise, if the second offense was then inexistent, no jeopardy could attach therefor during the first prosecution, and consequently a subsequent charge for the same cannot constitute second jeopardy. By the very nature of things there can be no double jeopardy under such circumstance, and our Rules of Court cannot be construed to recognize the existence of a condition where such condition in reality does not exist. General terms of a statute or regulation should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that exceptions have been intended to their language which would avoid results of this character. (*In re* Allen 2 Phil., 641.)

When the Rules of Court were drafted, there was absolutely no intention of abandoning the ruling laid down in the Diaz case, and the proof of this is that although the said Rules were approved on December 1939, yet on January 30, 1940, this Court decided the Espino case reiterating therein the Diaz doctrine. Had that doctrine been abandoned deliberately by the Rules of Court as being unwise, unjust or obnoxious, logically it would have likewise been repudiated in the Espino case by reason of consistency and as a matter of justice to the accused, who should in consequence have been acquitted instead of being sentenced to a heavy penalty upon the basis of a doctrine that had already been found to be wrong. There was absolutely no reason to preclude this Court from repealing the doctrine in the Espino case, for as a mere doctrine it could be repealed at any time in the decision of any case where it is invoked.

The fact that it was not so abandoned but reiterated, is a clear proof that the mind of the Court, even after the approval of the Rules, was not against but in favor of said doctrine.

For these reasons we expressly repeal the ruling laid down in People *vs.* Tarok, 73 Phil., 260, as followed in People *vs.* Villasis, 46 Off. Gaz. (Supp. to No. 1), p. 268. Such ruling is not only contrary to the real meaning of "double jeopardy" as intended by the Constitution and by the Rules of Court but is also obnoxious to the administration of justice. If, in obedience to the mandate of the law, the prosecuting officer files an information within six hours after the accused is arrested, and the accused claiming his constitutional right to a speedy trial is immediately arraigned, and later on a new fact supervenes which, together with the facts existing at the time, constitutes a more serious offense, under the Tarok ruling, no way is open by which the accused may be penalized in proportion to the enormity of his guilt. Furthermore, such a ruling may open the way to suspicions or charges of collusion between the prosecuting officers and the accused, to the grave detriment of public interest and confidence in the administration of justice, which cannot happen under the Diaz ruling.

Before closing, it is well to observe that when a person who has already suffered his penalty for an offense, is charged with a new and greater offense under the Diaz doctrine herein reiterated, said penalty may be credited to him in case of conviction for the second offense.

For all the foregoing, the petition is denied, and the respondent court may proceed to the trial of the criminal case under the amended information. Without costs.

Ozaeta, Pablo, Padilla, Tuason, Montemayor, and *Reyes, JJ.,* concur.

BENGZON, *J.,* concurring and dissenting:

I agree that People *vs.* Tarok and People *vs.* Villasis should be overruled. But I submit that the effect of such overruling should be prospective, in the sense that it should not affect the herein petitioner who has relied thereon in presenting his case. (Moncado *vs.* Tribunal del Pueblo, 45 Off. Gaz., p. 2850.)

Petition denied.

[No. L-2217. March 23, 1950]

MIGUEL R. CORNEJO, as attorney for Arcadia Acacio et al., petitioner, *vs.* BIENVENIDO A. TAN, Judge of First Instance of Rizal, respondent.

APPEAL; DIRECT CONTEMPT, NO APPEAL LIES FROM ORDER OF.—No appeal lies from an order of a superior court declaring a person in direct contempt thereof.

ORIGINAL ACTION in the Supreme Court. Prohibition.

The facts are stated in the opinion of the court.

Petitioner in his own behalf.
Respondent Judge in his own behalf.

BENGZON, *J.:*

In civil case No. 483 of the Court of First Instance of Rizal, entitled "Cariño, et al *vs.* Acacio, et al.," Atty. Miguel R. Cornejo was (allegedly) asked by the defendants Acacio to act as their counsel; but for his convenience he requested his companion, Attorney Palacol, to handle it. The latter entered his appearance and acted accordingly. On May 21, 1948, during the hearing of the case, Cornejo was presented as a witness. Practically all the questions were objected to by opposing counsel, and the judge, the respondent Bienvenido A. Tan, sustained almost all objections. Whereupon Attorney Cornejo left the witness stand and approached the attorney's table asking that his appearance for the defendants be noted. It was apparent he wanted to say as counsel what he had been prevented from saying as witness. The respondent judge told him he could not thus appear, there being already one lawyer and no substitution of counsel had been accomplished in accordance with the rules.

A few days later, Attorney Cornejo submitted a memorandum in which he said, among other things, that the judge had unduly favored the plaintiffs, to the extent of advising Attorney Palacol "to fix the case because his position was hopeless," and that the memorandum was filed as a protest against the "unjust, hostile, vindictive and dangerous attitude of the judge." The memorandum further stated that copies thereof had been sent to the Secretary of Justice, the Supreme Court, and the Office of the President of the Senate.

In an order dated May 26, 1948, the respondent judge, rejecting the accusation of partiality, stated that in accordance with his usual practice he had told Attorney Palacol to see if the matter could be settled amicably. Then he required Attorney Cornejo to show cause why he should not be punished for contempt on four counts, namely for appearing in court without being a party or attorney in the case, for using offensive language, for misbehavior in the presence of the court and for publishing his memorandum before it was submitted and decided by the court.

Answering the order, Attorney Cornejo expressed doubts that he would be treated impartially because the charges of contempt had been made by the judge himself, and reiterated his accusation that the judge had unduly anticipated his opinion on the case in favor of plaintiffs, "demonstrating his over-anxiety to dispatch the case" "indirectly aiding counsel for the plaintiffs" "insulting and humiliating the undersigned attorney while on the witness stand, etc."

Then he went on to explain away or rebut the charges made.

Immediately thereafter Attorney Cornejo repaired to this Court asking for judgment ordering the respondent judge to admit his appearance as counsel for the defendants in civil case No. 483, to refrain from rendering his decision in said case until he shall have allowed the petitioner as counsel for defendants to present further evidence, and to stop all action on the proceeding for contempt of court.

On June 7, 1948, we required the respondent to answer the amended petition within ten days. We also resolved that upon the filing of bond by petitioner in the amount of ₱200 a writ of preliminary injunction will be issued. Such writ was actually issued on June 15, 1948.

It appears, however, that on June 5, 1948, the respondent judge decided civil case No. 483. And on June 4, 1948, he declared Attorney Cornejo guilty of contempt and sentenced him to pay a fine of ₱100 or in case of insolvency, to suffer imprisonment for ten days. It also appears that on the same day Attorney Cornejo interposed an appeal, which was denied by the respondent, on the ground that there is no appeal in the matter of direct contempts.

In view of these developments and of others to be indicated later on, the petitioner now asks: (1) that the respondent be required to admit and recognize his appearance as counsel in civil case No. 483, and that the decision in that litigation be set aside on the ground that defendants were deprived of their right to present further evidence through the petitioner as counsel, and (2) that the judgment for contempt be reviewed and revoked.

On the first point it further appears that, as the injunction order proved too late, Attorney Palacol submitted on June 23, 1948, a "petition to set aside judgment or proceeding" seeking relief under Rule 38 of the Rules of Court, and that upon denial thereof he appealed on July 12, 1948 to the Court of Appeals. Wherefore, it is reasonable to expect that this question will be decided by the Court of Appeals upon a review of the main controversy. Upon this ground, and partly because petitioner failed to implead the opposing parties in the said civil case No. 483, this portion of the petition may not be granted in these proceedings.

On the second point, it is settled that no appeal lies from an order of a superior court declaring a person in direct contempt thereof.[1] Now, was the submission of the memorandum a direct contempt? The respondent held it was (1) because Cornejo was not an attorney in the case; (2) because it used offensive language against the court; and (3) because it was published before it was submitted and decided by the court. Copy of the memorandum is part

[1] Section 2, Rule 64, Rules of Court; People *vs.* Abaya, 43 Phil., 247; Carag *vs.* Warden of the Jail of Cagayan, 53 Phil., 85.

of the record before us. It contains the following paragraph:

"It is further respectfuly prayed that this memorandum be taken for a protest against what he believes to be unjust, hostile, vindictive and dangerous attitude or conduct of the presiding Judge, Hon. Bienvenido A. Tan, of this Honorable Court in a democratic government where laws shall reign supreme unless the same Judge wants to sabotage the present administration of the President who is seeking the restoration of public peace and order and the faith of the people in our Government".

That is indeed strong language. It is insulting and contemptuous.[2] The judge may have erred in some of his rulings; but mistakes never justify offensive language. As was said in Salcedo *vs.* Hernandez, 61 Phil., 729:

"It is right and plausible that an attorney, in defending the cause and rights of his client, should do so with all the fervor and energy of which he is capable, but it is not, and never will be so for him to exercise said right by resorting to intimidation or proceeding without the propriety and respect which the dignitiy of the courts require. The reason for this is that respect of the courts guarantees the stability of their institution."

And the last paragraph informing the judge that copies of the memorandum had been furnished "the Honorable, the Secretary of Justice, etc.", could rightly be interpreted as an attempt to intimidate the court in the exercise of its judicial functions.

Omitting reference to the other points, enough has been stated to show that there was no clear abuse of the respondent's powers in declaring Attorney Cornejo to be in direct contempt. Petition denied. No costs.

Moran, C. J., Ozaeta, Pablo, Padilla, Tuason, Montemayor, and *Reyes, JJ.,* concur.

Petition denied.

[No. L-2582. March 23, 1950]

TRINIDAD SEMIRA and ISIDORO O. MERCADO, petitioners, *vs.* JUAN ENRIQUEZ, Judge, Court of First Instance of Batangas, respondent.

JUDGMENTS; PETITION FOR CORRECTION OF JUDGMENT AND EXTENSION OF TIME TO APPEAL; DUTY OF COURT TO DECIDE.—In case a party to a case files a petition for correction of the judgment rendered and for an extension of time to perfect an appeal, he is entitled to expect action thereon by the court. The latter is in duty bound to decide and resolve the two petitions and it is unfair for it to declare the judgment rendered in the case final and executory without first complying with its duty to act on the petitions for extension of time to perfect the appeal and for correction of judgment.

ORIGINAL ACTION in the Supreme Court. Mandamus.

The facts are stated in the opinion of the court.

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[2] Lualhati *vs.* Albert, 57 Phil., 86; Salcedo *vs.* Hernandez, 61 Phil., 724.

Potenciano A. Magtibay for petitioners.
Respondent Judge in his own behalf.

PADILLA, *J.:*

This is a petition for a writ of *mandamus* to compel the respondent court to correct an erroneous statement made in its order of 26 May 1948, entered in civil case No. 43 of the court of first instance of the province of Batangas entitled "Trinidad Semira et al., plaintiffs, *vs.* Jose R. Azores et al., defendants;" to secure a declaration by this Court that the motion for correction of 21 June 1948 filed in said case by the petitioners, the plaintiffs in the court below, suspended the running of the 30-day period within which an appeal could be taken; and to have the order of 25 September 1948 entered by the respondent court in the case, whereby it declared that the judgment rendered therein had become final and executory, set aside.

Answering the petition, the judge of the respondent court alleges that the defendants in the case, in which the judgment sought to be appealed was entered, are necessary parties and must be joined; and, after setting forth the proceedings in the court below pertinent to the question raised by the petitioners, prays that the petition be dismissed for lack of merit.

The facts alleged in the petition are as follows: The petitioners are the plaintiffs and Jose R. Azores, Sinforoso Azores, Antonio Azores, Norberta Azores, Bienvenido Azores, Apolonia Azores, Manuel Azores and Juana Azores are the defendants in civil case No. 43 of the court of first instance of Batangas. On 7 July 1944, judgment was rendered therein for the defendants. Counsel for the plaintiffs received a copy of the judgment on 7 August 1944. Twenty-seven (27) (should be 23) days after receipt of the notice of judgment, and three (3) (should be 7) days before the last day of the 30-day period within which the losing party could perfect an appeal, or on 30 August 1944, counsel for the plaintiffs filed a motion for reconsideration. On 26 May 1948, after the record of the case had been reconstituted, the respondent court denied the motion for reconsideration. On 21 June, counsel for the plaintiffs received a copy of the order denying the motion for reconsideration. But prior to the receipt of a copy of the last order, on 5 June 1948 counsel for the plaintiffs filed an urgent ex-parte petition *ad cautelam,* dated 1 June 1948, for additional 15 days within which to perfect the appeal, should the court deny the motion for reconsideration. As in the order of 26 May 1948, denying the motion for reconsideration, a misstatement was made, to wit: that the defendants filed the motion for reconsideration and the plaintiffs filed an opposition thereto, when it was just the reverse, on 21 June 1948, or on the same day counsel for the plaintiffs received a copy of the last mentioned order, counsel filed a petition for

correction and set it for hearing on 3 July following. As counsel for the plaintiffs did not receive notice of any action taken by the court on the two petitions for extension of time and for correction, he addressed a letter to the clerk of the court of first instance of Batangas inquiring as to what action, if any, had been taken on the petition for correction. On 2 October 1948, counsel for the plaintiffs received a copy of the order dated 25 September 1948, holding that the judgment rendered in the case on 7 July 1944 had become final and executory, because the motion for extension of time, in the opinion of the court below, could be granted for good reasons only and not when it is for the purpose of delay, and that the petition for correction did not stop the running of the 30-day period within which an appeal could be perfected, because the misstatement was just a clerical error which could not and did not mislead the plaintiffs—now petitioners. The respondent court added that if the extension of time prayed for had been granted, the last day would have been 9 (should be 13) July 1948, and if denied, the last day would have been 24 (should be 28) June 1948.

That the defendants in the case for whom judgment was rendered and from which the plaintiffs—now petitioners— attempted to appeal should have been brought in or joined as respondents, admits of no doubt. They are the parties directly affected in these proceedings.

The petitioners, plaintiffs in the case in the court below, were entitled to expect action by the respondent court on their petitions for extension of time to perfect the appeal and for correction of the order of 26 May 1948. The respondent court was in duty bound to decide and resolve the two petitions and it is unfair for it to declare the judgment rendered in the case final and executory without first complying with its duty to resolve and decide the petitions for extension of time to perfect the appeal and for correction of the aforesaid order of 26 May 1948.

The petitioners are directed to amend their petition to include or implead as respondents the defendants in the case in the court below, within five (5) days from notice or receipt of a copy of this resolution; and, after such amendment shall have been made, let the new respondents answer the petition within five (5) days from the date of service upon them of the amended petition.

Moran, C. J., Ozaeta, Pablo, Bengzon, Tuason, Montemayor, and *Reyes, JJ.,* concur.

PADILLA, *J.:*

I hereby certify that Mr. Justice Torres voted in favor of the dispositive part of this resolution.

Cause remanded to the lower court.

DECISIONS OF THE COURT OF APPEALS

[No. 2769–R. June 4, 1949]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* MORO KIMING, defendant and appellant

CRIMINAL LAW; HOMECIDE; FIRING UPON ONE WHO IS FLEEING, NOT LEGALLY JUSTIFIED.—The facts established in this case show that accused is responsible of the crime of *homicide* attended by the mitigating circumstance of acting in proximate vindication of a grave offense to himself and to his spouse, and that of having voluntarily surrendered himself to the agents or person in authority immediately after the commission of the crime. Accused is responsible for homicide because his firing upon the deceased when the latter was fleeing was not legally justified (U. S. *vs.* Carrero, 9 Phil., 544; See U. S. *vs.* Firmo, 37 Phil., 133). When the offender stops his offensive acts and flees, the right of the person attacked to take positive physical action against his assailant likewise ceases (U. S. *vs.* Vitug et al., 17 Phil., 1).

APPEAL from a judgment of the Court of First Instance of Zamboanga. Villalobos, J.

The facts are stated in the opinion of the court.

Agustino Y. David for appellant.

Assistant Solicitor General Inocencio Rosal and *Solicitor Martiniano P. Vivo* for appellee.

FELIX, *J.:*

This is an appeal interposed by the defendant Moro Kiming against the decision of the Court of First Instance of Zamboanga finding him guilty of murder, attended by two mitigating circumstances, vindication of a grave offense and voluntary surrender, and sentencing him to suffer the indeterminate penalty of not less than two (2) years of *prisión correccional,* nor more than twelve (12) years and one (1) day of *reclusión temporal,* to indemnify the heirs of the deceased, Moro Jayari, in the amount of ₱2,000, with the accessory penalties provided for by law, and to pay the costs.

The facts of the case, as concisely summarized in the Solicitor General's brief, are substantially as follows:

At about 11 o'clock in the morning of January 27, 1947, Gregorio Cainglet, the Mayor of Kabasalan, Zamboanga, and police sergeant Alde went to *barrio* Tandu Timang to investigate the killing which had been reported by Moro Iman Puntucan, a barrio lieutenant. Upon arriving at the place they saw the deceased Moro Jayari lying with his face down along the trail, ten meters away from the house of appellant Moro Kiming, holding a bundle of red pepper with his left hand and with a towel around his neck. The deceased had three wounds, two at the back and one in front (Exhibits C, D, D–1 and D–2). Appellant, having voluntarily surrendered with his gun (Exhibit B), was investigated in jail by the

sergeant of police and the municipal mayor, the latter being at the same time the ex-oficio Justice of the Peace, and in that investigation Moro Kiming admitted having killed Jayari, and signed a statement (Exhibit A) after the same was translated to him by the mayor. Because of its importance Exhibit A is hereinbelow reproduced in *toto*, to wit:

"I, Moro Kiming, 27 years old, married, and a resident of Tandu Timang, Kabasalan, Zamboanga, after having been duly sworn to according to law, depose and say:

"That at about noon on January 26, 1947, I went to make a personal necessity at the beach, a distance of about 100 meters from my home.

"That while I was buttoning my trousers I heard the voice of my wife calling for me. My wife was alone in the house.

"That I ran towards my house and upon arrival I saw a gun leaning at the stairs of my house. I took hold of the gun and asked 'who's there?' Immediately after, a man jumped from my house and ran, but about 10 meters from the place where he jumped he faced at me. I was already holding the gun and loaded same. When he faced my way, I shot him hitting him on the chest. That after the shooting, I advanced and shot him also at his back while he was already face down.

"That I recognized the man while jumping from my house. He was Moro Jayari.

"That I shot him without asking him any question.

"That after the shooting, I went to Kalintana and reported to the barrio lieutenant Panglima Puntokan.

Kabasalan, Zamboanga, January 28, 1947." (Exhibit A.)

An examination of the records shows that there were no eyewitnesses to the occurrence other than the appellant and his wife, and the outcome of this case must perforce depend on the evidence they have supplied. Therefore, in passing upon the merits of the appeal we have to determine whether in the light of such evidence, specially after appellant has admitted to have killed Jayari, he can be held criminally liable for said death.

The version of the defense as told by Mora Seraha, appellant's wife, is that while she was cooking oil under her house in Tandu Timang (Kabasalan, Zamboanga), she was out of a sudden embraced by Jayari. She resisted, calling for help, and as she continuously shouted the name of her husband, Jayari told her not to shout, as otherwise he would kill her. This witness further declared that Jayari had a rifle with him; that she was able to disengage herself from Jayari's hold and ran upstairs the house; that Jayari followed her, and in so doing he left his gun by the stairs of the house; that once they were inside the house he embraced, kissed, touched all the parts of her body and tried to undress her, tearing her clothes; that when her husband arrived in response to her call, he got the rifle left at the stairs and said: "What is that?"; that when Jayari released her and jumped from the window, and hearing one shot and not knowing whether Jayari had been hit or not, she went to the window and saw that he had fallen to the ground

though he was able to stand up and tried to run towards her husband to get the gun; that Jayari was about three fathoms more or less from appellant when the latter fired the second shot and Jayari fell; that Jayari who lives also in Tandu Timang near the *sitio* of Naga, is her brother-in-law having married her now deceased elder sister; that after the firing she went down the house and found out that it was her husband who had fired at Jayari and caused his death; and that after the shooting she accompanied her husband to surrender himself to the authorities.

In his testimony given at the hearing Moro Kiming declared that he was by the seashore, when he heard the voice of his wife continuously calling for help. In response to that call he ran towards his house, and when he got near, he saw a person whom at first he did not recognize, embracing his wife. Upon reaching the stairs he saw a rifle leaning thereon, and taking hold of it tried to find out whether it was loaded. At that moment he shouted "Who is that?" and the man jumped through the window of the house, so he fired at him but did not know whether the man was hit. When the man landed on the ground he was able to run about 10 meters ahead and then turned around and rushed towards him. Upon coming nearer he fired the second shot and the man fell dead. It was only then when he recognized the deceased, because he could not see very well on account of his anger. Testifying further on this point appellant said that after firing the first shot the man slid down, and the moment he turned towards appellant the latter fired the second shot.

If the evidence for the prosecution is set off by contrast or comparison with the evidence of the defense, it will be promptly noticed that in their testimonies in court, the appellant and his wife tried to smooth in some way the former's previous damaging admissions, hinting at facts that in all probability are misleading and apparently untrue. For example, in the record there is no specific statement to the effect that the deceased was the owner of the rifle that was fired against him, but the spouses Seraha and Kiming positively declared that said rifle was carried by Jayari, left at the stairs of the house when he went up after the woman, and taken from that place by Kiming. If the deceased was only carrying a bunch of red pepper (chili) in his hands when shortly before the occurrence he was met by Pilato Jumula, who did not see him carrying any weapon such as a bolo or a rifle; and if the deceased with a towel around his neck, was still holding that bunch of red pepper in his left hand at the time of his death, occurred a few minutes thereafter, it would not seem very likely that he would have carried that rifle when, finding Seraha cooking oil under her house,

he allegedly kissed and embraced her, and touching all the parts of her body tried to undress her and tore her clothes—all of this without leaving the arm nor the bunch. Jayari would have had his hands occupied to execute the acts attributed to him. Furthermore, it sounds incredible that the deceased would out of a sudden attempt to abuse Seraha without first ascertaining whether her husband was in the house or in the vicinity, if he was to run away as he did run away, when the latter answered her calls for help. If we were to allow the imagination to figure out what most probaly might have occurred, we would find it more easy to believe that on account of previous immoral advances that the deceased made upon his sister-in-law and which she reported to her husband, the latter laid a trap or waited for an occasion to retaliate. But, as stated before, there is no evidence on record to establish these more probable facts, and in judicial cases, specially in criminal prosecutions where defendant's guilt must be shown beyond reasonable doubt, no reliance can be had on wistful lucubrations unsupported by proofs.

Having this in mind, would the evidence submitted justify appellant's conviction of the crime he is charged? We need not remind that by the very lips of appellant and his wife it was established, that immediately upon landing on the ground after Jayari's jump over the window of appellant's house, the latter fired two shots at the former causing his death. Now, judging from the respective positions of the parties and the location of the wounds inflicted, if the deceased jumped from the window, the first gun shot with entrance at the back must have been fired when he was about 10 meters from the house. The deceased must then have turned around facing appellant and being shot for the second time he was hit on the chest, falling dead. The deceased could not have run towards appellant and approached him to a distance of three fathoms, because according to the evidence, appellant was about the stairway when he fired the rifle, and Jayari fell dead where he was found, for appellant and his wife abandoned him there, about 10 meters from their house. Moreover, appellant declared in court that when the deceased jumped over the window, he was able to run 10 meters from the place where he landed—probably due to the impulse of the jump; that he fired the first shot at a distance of about 5 meters from the deceased who slid down, and that the moment he turned towards appellant he was shot for the second time.

After appellant admitted having killed Jayari, it was the duty of the defense to show cause for exoneration if appellant was to elude criminal liability. As cited by the Solicitor General:

"Where the killing is admitted and self-defense or some justifying circumstance is invoked, the burden is upon the defendant to prove the exculpatory facts" (People *vs.* Ramponit, 62 Phil., 284),

and this end is achieved not by testimony of dubious veracity but by convincing evidence (People *vs.* Parás, SC–G. R. No. L–561, January 30, 1948), sufficient to engender belief that the facts occurred as claimed by him (People *vs.* Cabanillos, G. R. No. 42740), and appellant "must rely on the strength of his own evidence and not on the weakness of that of the prosecution for even if that were weak, it could not be disbelieved after the accused himself had admitted the killing." (People *vs.* Ansoyon, SC–G. R. No. L–3, 42 O. G. 1238, 1242.)

Unfortunately for appellant he failed to produce satisfactory evidence for his exoneration. The facts established in the case show that appellant is responsible of the crime of *homicide* attended by the mitigating circumstance of acting in proximate vindication of a grave offense to himself and to his spouse, and that of having voluntarily surrendered himself to the agents or person in authority immediately after the commission of the crime. Appellant is responsible for homicide because his firing upon the deceased when the latter was fleeing was not legally justified.

"When an aggression is in retaliation for an insult, injury or threat it cannot be considered as a defense but as a punishment inflicted on the author of the provocation, and in such a case the most that courts could do would be to consider the same as an extenuating circumstance, but never as a cause of complete exemption from liability." (U. S. *vs.* Carrero, 9 Phil., 544) See U. S. *vs.* Firmo, 37 Phil., 133).

When the offender stops his offensive acts and flees, the right of the person attacked to take positive physical action against his assailant likewise ceases, and the reason for this is that:

"A fleeing man is not dangerous to the person from whom he flees. When the danger ceases, the right to injure ceases. When the aggressor turns and flees, the person assaulted must stay his hand." (U. S. *vs.* Vitug et al., 17 Phil., 1).

We do not concur with the trial judge in considering the case as one of murder, because even granting that the evidence shows that the deceased was running away when he was fired upon by appellant, this fact, which prevents its appreciation as an act of self-defense or of defense of the spouse constitutes no element of treachery because the fleeing man was aware that his acts would arouse trouble and stir up retaliation on the part of the persons offended by him.

Wherefore, finding Moro Kiming guilty of homicide with the attendance of said two mitigating circumstances, pur-

suant to the provisions of articles 13, Nos. 5 and 7, 46, 64, No. 5 and 249 of the Revised Penal Code, and of the Indeterminate Sentence Act, and in accordance with Section 106 of the Administrative Code for the Department of Mindanao and Sulú, he is hereby sentenced to suffer from two (2) years, four (4) months and one (1) day of *prisión correccional* to eight (8) years and one (1) day of *prisión mayor*, to the corresponding accessories of the law, to indemnify the heirs of the offended party in the sum of ₱2,000, and to pay the costs. With such modification the decision appealed from is hereby affirmed.

So it is ordered.

Torres, Pres. J., and *Endencia, J.*, concur.

Judgment modified.

[No. 2752–R. June 9, 1949]

CEFERINO NIERBO, plaintiff and appellee, *vs.* FERNANDO FERNANDEZ, defendant and appellant

PLEADING AND PRACTICE; ACTIONS; VENUE OF ACTIONS; WAIVER OF IMPROPER VENUE.—In a criminal case the action should be brought within the territorial jurisdiction or venue of the court where the crime was committed; but in a civil case the action should be brought where the plaintiff or the defendant resides, except in real actions which should be brought in the venue where the real property involved or part of it lies; improper venue is waived if no objection to it is made prior to the trial (Rule 5, Secs. 1, 3, and 4).

APPEAL from a judgment of the Court of First Instance of Iloilo. Blanco, J.

The facts are stated in the opinion of the court.

Hautea, Espinosa & Laurea for appellant.
Pedro Davila for appellee.

JUGO, *J.*:

Ceferino Nierbo brought action against Fernando Fernandez for services he had rendered the latter as a worker either in the latter's house or in his farm, such kind of worker being known in the locality as *harga*. Nierbo alleged that he had began to work for Fernandez since the month of April, 1936, in the municipality of Lucena, province of Iloilo, with the compensation of eight (8) *bultos* of palay annually, in addition to free board, lodging, and clothing; that in 1937 his compensation was increased to twelve (12) *bultos;* that in 1945 it was raised to fourteen (14) *bultos* and in 1946 to fifteen (15) *bultos;* that he continued rendering services from April, 1936 to October, 1946. without receiving his above-mentioned rice compensation.

The defendant answered in substance that all the compensation due the plaintiff had been paid.

The court below found that the plaintiff began his work for the defendant from the agricultural year 1941–42 with an annual compensation of ten (10) *bultos* of palay in addition to board, lodging, and clothing. The plaintiff interrupted his work in the year 1943–44. He resumed his work in 1944–45 under the same conditions, but with eleven (11) *bultos* as compensation and in 1945–46, with twelve (12) *bultos*. He earned a total of forty-three (43) *bultos*. For the year 1945–46 he was paid twelve (12) *bultos*, leaving a balance due him of thirty-one (31) *bultos*. The court rendered judgment in favor of the plaintiff for thirty-one (31) *bultos* or its market value at the time of delivery, with costs against the defendant.

The defendant appealed.

The court below found that the services of the plaintiff began only in April, 1941 because it is proved by the document Exhibit 1 (Translation, Exhibit 1–A) signed by the plaintiff, which is an acknowledgment that he began to work on said date, not giving credence to his statement, that he began to work in 1936. Likewise the court below found that the compensation of the plaintiff for the year 1945–46 had been paid in accordance with the receipt or acknowledgment Exhibit 2 (Translation, Exhibit 2–A) signed by him. With regard to the agricultural years 1941–45, the defendant claims that the plaintiff had issued the corresponding receipts but they had been lost by reason of the war. The trial court, however, did not believe this alleged loss as it is the common excuse given by persons who cannot produce any document.

We do not find any reason for disturbing the findings of fact made by the trial Judge, especially because he gave credence only to such oral testimony as was founded on written documents, both against and in favor of either party, such documents being Exhibits 1 and 2. He did not believe the testimony of the plaintiff that he began to work in 1936 for the document Exhibit 1 signed by him shows that he began working only in April, 1941; on the other hand, he believed the testimony of the defendant that the services of the plaintiff for 1945–46 were paid for as shown by Exhibit 2 signed by the plaintiff, without believing the testimony of the defendant that he had paid for all the services of the plaintiff, for he had no documents to corroborate the statement, giving the unacceptable excuse that he had lost them.

The appellant contends that the lower court erred in not dismissing the complaint for lack of evidence as to venue. It does not appear that the defendant moved for dismissal on this ground; having submitted himself to

the court, he cannot now raise the question on appeal. In regard to this point, the appellant says:

"Y este análisis deserrollado hasta esta parte del argumento nos ha llevado al descubrimiento de que tanto en el testimonio del demandante (T. N. T. 2–21) como en la decisión del juzgado (E. A. 7–9) no hay una palabra que indique dónde, en la República, i.e.: sitio, barrio, municipio o provincia, tuvo lugar el contrato sobre arrendamiento de obras o servicios entre Fernando Fernandez y Ceferino Nierbo que diera lugar al motivo de acción de la demanda, hechos aquéllos jurisdiccionales en estos autos." (Page 16, appellant's brief.)

In a criminal case the action should be brought within the territorial jurisdiction or venue of the court where the crime was committed; but in a civil case the action should be brought where the plaintiff or the defendant resides, except in real actions which should be brought in the venue where the real property involved or part of it lies; improper venue is waived if no objection to it is made prior to the trial (Rule 5, Secs. 1, 3, and 4).

In view of the foregoing, the judgment appealed from is affirmed, with costs against the appellant. It is so ordered.

De la Rosa and *Rodas, JJ.*, concur.

Judgment affirmed.

[No. 2303–R. Junio 22, 1949]

MARIA HILVANO, demandante y apelada, *contra* FRANCISCO LLENADO y ANA V. DE LLENADO, demandados y apelantes.[1]

OBLIGACIONES Y CONTRATOS; DONACIÓN CON CAUSA ONEROSA Y REMUNERATORIA EN DOCUMENTO PRIVADO, ES VALIDA; CASO DE AUTOS.—Una cesión y donación otorgada en un documento privado, por un sacerdote, a favor de una persona, en consideración a los servicios prestados por ésta a la madre y hermana de aquel y a los que a él mismo se haría, es una *donación con onerosa* y remuneratoria, perfectamente válida, y se regirá por la ley sobre contratos. (Manalo *contra* De Mesa, 29 Jur. Fil., 523.)

APELACIÓN contra una sentencia del Juzgado de Primera Instancia de Leyte. Piccio, J.

Los hechos aparecen relacionados en la decision del Tribunal.

Sres. Anota & Montilla en representacion de los apelantes.

Sres. Francisco Astillas y *Antonio C. Veloso* en representacion del apelado.

DE LA ROSA, *M.:*

Maria Hilvano inició esta causa para que se la declare dueña absoluta de la finca que en su demanda se describe así:

"One third of the land declared under tax declaration No. 15087 in the name of Rev. Buenaventura Gelera, now deceased, situated

[1] Véase la Decisión del Tribunal Supremo fechada 31 de agosto de 1950. Se confirma la sentencia.

in the poblacion of Tacloban, Leyte. This one third (⅓) parcel of land is bounded on the north by the land of Valentin M. de Atenta; on the east, by the land of Buenaventura Gelera; on the south by the land of Eugenio and Cipriano Adona; and on the west by the land of Generoso Quintero. Entire land under 15087 assessed for ₱300.";

y que Francisco Llenado y Ana V. de Llenado sean condenados a evacuar dicha propiedad y a pagar alquileres a razon de ₱5 al mes desde el enero de 1946, mas intereses y costas.

En su contestación, los demandados alegan las siguientes defensa y contrarreclamación:

"And as special defense allege:

That defendants are the absolute owners of the land described in the complaint having acquired it by purchase from the only heirs of the original owner, the late Rev. Fr. Buenaventura Gelera;

That plaintiff has not stated a cause of action.

And that defendants set up the following counterclaim:

1. That plaintiff and defendants are all of age and residents of Tacloban, Leyte;

2. That despite repeated demands for payment, plaintiff refused and still refuses to pay to the defendants the monthly rental of the lot occupied by her house situated on the other half of Tax Dec. No. 15087 as described on the complaint from July 19, 1946 the date of defendant ownership of the said lot at ₱8 a month until filing of this answer;

3. That plaintiff be ordered to vacate said premises."

Aportadas por las partes sus respectivas pruebas, el Juzgado de origen dictó esta sentencia:

"In view thereof, this Court hereby renders judgment declaring the portion described in the complaint the property of plaintiff, ordering the defendants to convey same to her by means of a duly executed public instrument, after proper subdivision of the land is had, with the costs against the defendants.

Said defendants are furthermore ordered to pay the plaintiff the corresponding rentals from January, 1946 at ₱5.00 a month, with legal interests thereon, until the same is fully paid, while the defendants' counterclaim for rentals are hereby dismissed. So ordered."

Contra este fallo se alzaron los demandados.

La finca urbana, una tercera parte de la cual Maria reclama para si su dominio pleno, pertenecía al hoy finado P. Buenaventura Gelera, dueño escrito bajo el sistema Torrens. Como Maria y la hermana de esta, llamada Dolores Hilvano, cuidaran de la madre y hermana del P. Ventura, (Por este nombre era comunmente conocido el P. Buenaventura Gelera, y el mismo así firmaba su correspondencia privada), en 1933 las cedió dicha tercera parte en compensación y pago de los servicios por ellas rendidos, Exhibits C y C–1. Para formalizar de algun modo esta cesión en P. Ventura otorgó a favor de Maria el Exhibito A escrito en visaya, cuya traducción al ingles dice:

"DOCUMENT OF CESSION OF LAND

I, Fr. Buenaventura Gelera, of age and resident of Quiot, Merida, Leyte, declare as follows:

That the land on which the house of Maria Hilvano is standing, in Tacloban, Leyte, at M. H. del Pilar street, starting from the cacao tree to the front side, I have given it to her beginning this day in which I make this document and no one of my brothers will disturb it as being heir to said land.

I have given this land in consideration of her services rendered to my mother and my sister Cristeta Gelera.

Said Maria Hilvano knew about this cession made to her and in truth she is grateful to me, and we have signed this document in the presence of a witness, this date 21st of November, 1938, Tacloban, Leyte.

Sgd. P. B. GELERA
Sgd. MARIA HILVANO"

Despues de la muerte de la madre del P. Ventura, Maria administró los bienes de este en Tacloban, Leyte, y como ella encontrara algunas dificultades con los hermanos de aquel, recibió las cartas Exhs. F. y G, donde, en la primera fechada el 16 de julio de 1938, el P. Ventura la amonestaba por su dejadez y tolerancia a lo que hacían sus hermanos y en la segunda, del 28 de julio de 1939, la dice:

"Mana Via, I will repeat saying to you that you are my administratrix of all my belongings in Tacloban. Look after them since it is to you whom I will leave them in case I am at last called by God. Do not fear my brothers because I will answer for you on anything. Even to come up the house, should they ever force to do it, accuse them. If you see even their shadows, drive them away do not let them step on the lot because they are harmful people. I rely on you, Mana."

Maria y su hermana Dolores viven en esa tercera parte que aquella reclama de la finca del P. Ventura, en una casa propia que adquiriera por permuta en 1933 de Ulrica de Luna, quien testificando en este asunto, dijo:

"Q. Do you still own that house?—A. No, Maria Hilvano is owning it.

"Q. Since when?—A. Since 1933.

"Q. Why?—A. Fr. Ventura bought the house so as to give to Maria Hilvano—the house and the lot together.

"Q. How much did he buy the house? A. It was not money with which the house was bought, but four carabaos. It was Maria Hilvano who delivered to me the carabaos. That was the price of my house—four carabaos." (t. n. t. p. 16)

De hecho el mismo P. Ventura marcó el limite de esa tercera parte que cedió a Maria, de este modo, segun esta:

"Q. How was the ⅓ segregated from that lot in question?—A. He traced the land from the bathroom to a cacao tree down to the front to the side of the lot, indicating that as a dividing line.

"Q. Is that bathroom still there?—A. No more.

"Q. About the cacao tree, still there?—A. It died.

"Q. All visible signs had been shown to you to identify the boundary line segregating the ⅓ portion given to you?—A. The roots of the cacao tree are still there." (t. n. t. p 3)

Hasta la muerte del P. Ventura, ocurrida en 1945, Maria ha estado en posesión de dicha tercera parte como dueña y del resto de la parcela como administradora, sin interrupción y de una manera pacifica, y los demandados, los esposos llenado, eran sus inquilinos dentro de esa tercera parte y pagaban por el terreno que su casa ocupaba el alquiler mensual de ₱4, Exhibits B, E, E–1 y E–2; pero segun llenado, dejó de pagar dichos alquileres porque.

"A. Then, when Exequiel Gelera came and told me he was the owner, then it was to him that I have been paying the rentals." (t. n. t. p 30)

Exequiel Gelera es uno de los hermanos del P. Ventura y uno de los hermanos a quien este incriminaba en sus cartas Exhibitos F y G. Exequiel Gelera y sus sobrinos Agustin y Alejandro Gelera en 19 de julio de 1946 vendieron la mitad de esa finca que pertenecía al P. Ventura, la mitad que precisamente comprende la tercera parte cedida en pago y recompensa a Maria, a favor de los esposos Francsico Llenado y Ana Vieto (Anacleta Vieto), otorgando a favor de estos el Exhibit 2, por el que no solamente piden que Maria desaloje dicha tercera parte sino que les pague alquileres por el terreno que ocupa la casa que en ella tiene.

En su alegato los apelantes, relacionan los siguientes errores:

"1. The lower court erred in holding that the alleged donation in a private document was sufficient to transfer the ownership of the land in question to the plaintiff.

2. The lower court erred in holding that the plaintiff acquired title to the land in question by acquisitive prescription.

3. The lower court erred in not declaring the defendants owners of the land in question and in dismissing the counterclaim."

La principal y determinante cuestión suscitada concierne a la validez de la cesión de la tercera parte en cuestión de la finca del P. Ventura, que este hiciera en compensación y pago a la apelada en 1933, que luego se reafirmó en 21 de noviembre de 1938 con el otorgamiento del documento privado Exhibit A.

Una cuestión muy semejante, si no igual, por el Tribunal Supremo, en Bonifacia manalo *contra* Gregorio de Mesa, se decidió en favor de la validez de esta clase de cesión y donación.

"In these proceedings it is necessary to determine, first, the validity and efficacy of the donation of a tract of land made in the private document Exhibit 1 by the spouses Placida Manalo and Fernando Regalado in favor of the spouses Gregorio de Mesa and Leoncia Manalo; second, the authenticity and validity of the document Exhibit 2, wherein it appears that said spouses Regalado and Manalo sold and transmitted to the spouses Gregorio de Mesa and Leoncia Manalo the ownership and possession of a tract of land to which the said document refers.

In the document Exhibit 1 (rec., p 6), written in Tagalog and thereinafter translated, it appears that on May 10, 1903, the spouses Fernando Regalado and Placida Manalo, residing in the municipality of San Pablo, Laguna, declare that they are now old and incapacitated for work; that the woman has been ill for over a year and she feels that her death is approaching; that as both are without children to inherit from them, and moreover taking into consideration that their nephew and niece, the spouses Gregorio de Mesa and Leoncia Manalo, the latter of whom has lived with them from childhood and has been treated by them as a daughter, have been caring for them both up to the present time, they agree to donate to them the tract of land which they own, the location and boundaries whereof are set forth in the document; they further state that on account of the circumstances recited they make the donation to the exclusion of their other nephews and nieces, and they request the donees to bear such expenses as would be incurred in case the donor Placida Manalo should die. To this end title of ownership was made over to the donees with the injunction that in case any claim to said land should be set up by any brother or other nephew of the donors, said claim was to be rejected and ignored by all the authorities, for they prayed to God that He permit none of their relatives to disturb the donees' possession of the land.

From the foregoing it is seen that this donation was made for a valuable consideration, and is therefore subject to and governed in its nature, conditions and effects by the laws of contracts, in accordance with the provisions of article 622 of the Civil Code.

A donation for a valuable consideration has always been regarded, according to the provisions of law, as a genuine contract of cession or transmission of property, provided that the condition imposed by the donor upon the donee has been met; and so this court has held in the decision, among others, the case of Carlos *vs.* Ramil (20 Phil. Rep., 183), wherein this principle was established:

'When two persons advanced in years, being entirely alone and requiring the care of younger people, enter into a contract whereby it is agreed that, in consideration of such care during the lifetime of the former, they transferred their real estate to the persons thus caring for them, such a contract does not constitute a *donacion remuneratoria* but a *donacion con causa onerosa*, and is governed by the law of contracts and not that of donation." (29 Phil., pp 498, 449, 500 & 503)

Confirmando, por lo tanto, en todas sus partes la sentencia de que se apela, con las costas a los apelantes, se ordena, además, que una copia certificada de esta decisión se presente por la demandante en la oficina del Registrador de Títulos de la Provincia de Leyte para su anotación y efectos legales correspondientes. Así se ordena.

Jugo y *Rodas, MM.*, están conformes.

Se confirma la sentencia.

[No. 2399–R. July 11, 1949]

ENEDINA FOX VILLANUEVA, plaintiff and appellant, *vs.* RAMON VILLANUEVA, defendant and appellee

1. HUSBAND AND WIFE; DIVORCE; CONJUGAL PROPERTIES; JUDICIAL LIQUIDATION OF CONJUGAL PROPERTIES, NOT MANDATORY; SEPARATION OF PROPERTIES; EXTRA-JUDICIAL LIQUIDATION, ALLOW-

ABLE.—The contention that the judicial liquidation is mandatory and cannot be waived is untenable. Neither the Civil Code nor Act 2710 required formalities to be followed in the liquidation of conjugal properties after a decree of divorce. Under Article 1418 of the Civil Code either of the spouses, or their successors in interest, is free to renounce the effects and consequences of the inventory and liquidation required to be made after the dissolution of the conjugal partnership. In the absence of proven indebtedness to strangers, the provisions of Articles 1418 to 1431 of the Civil Code are mere rules and regulations, directory in nature, for the liquidation of the conjugal partnership in order to determine the net assets of the same which should be divided between the husband and the wife. The liquidation of the conjugal partnership is different from the separation of property during marriage which requires judicial decree (Art. 1232, Civil Code). In the case at bar, the community of property having been dissolved once the decree of divorce became final, there was no need of any independent petition for separation of property to be granted by court's decree. Moreover, under Rule 74, Section 1, of the Rules of Court, if there are no debts and the heirs and legatees of a decedent are of age and the minors are represented by their judicial guardians, the parties may, without securing letters of administration, divide among themselves as they see fit the estate of the decedent. In such partition, the liquidation of conjugal properties is implied. Hence, the ruling that the liquidation of the conjugal partnership may be made extra-judicially by and between the spouses, as laid down by the trial court, is correct.

2. ID.; ID.; ID.; ACT 2710, SECTION 9; HUSBAND NOT REQUIRED TO GIVE CHILDREN SHARE OF HIS PROPERTIES.—There is no law which requires the husband to give to his children any share of his properties. Section 9 of Act 2710 merely provides that the bonds of matrimony shall not be considered as dissolved with regard to the spouse who has not delivered to his legitimate children within one year after the decree of divorce the equivalent of what would have been due to them as their legal portion if said spouse had died intestate.

3. ID.; ID.; ID.; EXECUTIVE ORDER 141; BONDS OF MATRIMONY DISSOLVED UPON FINALITY OF DECREE OF DIVORCE.—By virtue of Executive Order No. 141, the bonds of matrimony of the spouses have already been dissolved from the time the decree of divorce became final (See 11, Ex. Or. No. 141). There is no need of the delivery of the so-called children's share in order to have the bonds of matrimony dissolved.

APPEAL from a judgment of the Court of First Instance of Manila. Peña, J.

The facts are stated in the opinion of the court.

Quisumbing, Sycip & Quisumbing for appellant.
Salvatierra & Liwag for appellee.

GUTIERREZ DAVID, *J.:*

Ramon Villanueva and Enedina Fox were legally married sometime in the year 1936, during which marriage they begot three children and acquired several properties. During the enemy occupation, their marriage was dissolved by virtue of a decree of divorce granted by the

Court of First Instance of Manila (case No. 2755). Subsequent to said dissolution, or in the month of October, 1944, they executed an agreement (Exhibit A), entitled "Agreement of Separation of Property of Husband and Wife", in which, the husband, Ramon Villanueva, released all his rights and interests over certain furniture, china and silverwares mentioned therein, on one 1941-Studebaker car and one dokar de luxe with horse and harness, and in three lots in Quezon City known as lots Nos. 17, 18, and 19, block No. 73, of the Diliman Estate; and the wife, Enedina Fox, in turn, released all her rights and interests in and to any and all real estate acquired by the conjugal partnership and personal property then owned by the husband, except those mentioned in said agreement. It was there further stipulated that the same "shall be a full, complete and entire settlement of the property, real and personal owned by said parties, and to be acquired by either of them in the future." At the foot of the document there appears written an acknowledgment thereof but the same has not been formalized before a notary public.

The three lots in Quezon City referred to in the agreement appear to have been acquired by the husband, Ramon Villanueva, from Francisco G. Joaquin for the sum of ₱30,000, as evidenced by the deed of transfer, Exhibit B, executed by the latter, on which no date of execution appears.

On October 3, 1945, the aforesaid spouses executed another deed (Exhibit 1), whereby they sold to the spouses Catalino T. Tiongson and Catalina Reyes, for the sum of ₱12,000, their rights, interests and participation on (1) Lots Nos. 1, 2 and 3, block No. 200, situated on the SE. corner of Sampaloc Avenue and south 15th Street, Diliman Estate, City of Manila, together with a two-story building of strong materials constructed thereon; and on (2) Lots Nos. 17, 18 and 19, block No. 73, of the Diliman Estate, with the right to repurchase within one year from the aforsaid date. Said right, however, as stipulated in said document, was reserved "to Ramon Viilanueva alone, his heirs, assigns and executors," and Enedina Fox renounced "all her rights and participation in the repurchase of any and all" of the properties sold in favor of the vendor Ramon Villanueva.

Sometime after the liberation of the City of Manila by the American forces, Enedina Fox sought to transfer to her name the three lots in Quezon City mentioned in agreement Exhibit A, but she was told that to effectuate such transfer said agreement must first be notarized, and that to notarize the same, Ramon Villanueva would have to ratify it before a notary public. So, she requested the latter to accompany her to the office of her attorney in

order to acknowledge the aforementioned agreement, but he (Ramon Villanueva) refused to do so, alleging that he had already purchased said three lots for the sum of ₱80,000 which Enedina obtained from him on January 3, 1945.

In view thereof, Enedina Fox instituted this action against Ramon Villanueva on August 3, 1946, in the Court of First Instance of Manila, seeking the liquidation and partition of their conjugal properties, in accordance with articles 1417-1431 of the Civil Code, alleging in her complaint that among the properties they had acquired during their marriage were lots 1, 2 and 3, block No. S–200 of the Diliman Estate, with improvements thereon, and lots Nos. 17, 18 and 19, block No. 73 of the Diliman Estate; that no liquidation or partition of their conjugal property has yet been made; and that defendant has disposed of some of said properties without previous judicial authority.

In his answer, the defendant averred that there had already been a partition of the conjugal property, whereby the properties mentioned in paragraph 2 of his answer were delivered to plaintiff, and lots Nos. 1, 2 and 3, block No. S–200, on the SE corner of Sampaloc Avenue and south 15th Street, Diliman District, Quezon City, with their improvements, were adjudicated to him as his share in the conjugal partnership; that immediately after said partition, the rights and interests of plaintiff over lots Nos. 17, 18 and 19, block No. 73, of the Diliman Estate were already vested in him, for valuable consideration; and that plaintiff renounced all her rights, interests and participation over all the lots aforementioned.

After trial, the court *a quo* dismissed the complaint of the plaintiff. Thereafter, the latter filed a motion to set aside the judgment of dismissal and for a new trial, based on newly discovered evidence to the effect that on December 20, 1947, plaintiff received an offer to buy lots Nos. 17, 18 and 19, block No. 73, of the Diliman Estate in question for the sum of ₱18,000 from Maxima P. de Obieta. The motion for new trial was denied. Hence, plaintiff interposed this appeal.

The trial court denied the judicial liquidation sought for; sustained that appellant renounced the three Quezon City lots in favor of the appellee by virtue of the deed Exhibit 1; and denied the motion for new trial based on newly discovered evidence. Appellant now assails said rulings of the trial court as erroneous.

Under the first assignment of error, appellant contends that the parties in this case never waived a judicial liquidation of the conjugal partnership; that such liquidation being mandatory and contemplated by law to protect not only the spouses but also their creditors and their chil-

dren, no waiver thereof can be valid for it is contrary to public interest or public order or prejudicial to a third person; and that in signing the agreement Exhibit A, the spouses and parties in this case did not intend a waiver of a judicial liquidation. It is further claimed that said agreement, purported to be tentative one, was made for the sole purpose of delivering to the appellant the properties enumerated therein, and for this reason, it did not assign properties for the children.

The contention that the judicial liquidation is mandatory and cannot be waived is untenable. Neither the Civil Code nor Act No. 2710 requires formalities to be followed in the liquidation of conjugal properties after a decree of divorce. Under article 1418 of the Civil Code either of the spouses, or their successors in interest, is free to renounce the effects and consequences of the inventory and liquidation required to be made after the dissolution of the conjugal partnership. In absence of proven indebtedness to strangers, as in this case, the provisions of articles 1418 to 1431 of the Civil Code are mere rules and regulations, directory in nature, for the liquidation of the conjugal partnership in order to determine the net assets of the same which should be divided between the husband and the wife. The liquidation of the conjugal partnership is different from the separation of property during marriage which requires judicial decree (art. 1232, Civil Code). In the case at bar, the community of property having been dissolved once the decree of divorce became final, there was no need of any independent petition for separation of property to be granted by court's decree. Moreover, under Rule 74, section 1, of the Rules of Court, if there are no debts and the heirs and legatees of a decedent are of age and the minors are represented by their judicial guardians, the parties may, without securing letters of administration, divide among themselves as they see fit the estate of the decedent. In such partition, the liquidation of conjugal properties is implied. Hence, the ruling that the liquidation of the conjugal partnership may be made extra-judicially by and between the spouses, as laid down by the trial court, is correct.

It is contended that the parties to agreement Exhibit A did not intend thereby a waiver of judicial liquidation. The very provisions of the agreement belie said contention. It is there clearly provided:

"The said wife hereby covenants and agrees that she, Enedina Fox, by these presents hereby releases all rights, interests, claims, demands, privileges and dower in and to any and all the real estate acquired by the conjugal partnership and personal property now owned by said Ramon Villanueva, husband, except those enumerated above.

"The said husband hereby covenants and agrees that the said wife shall have the right and privilege to remove from the con-

jugal home all the properties enumerated above and the personal property, paraphernalia and goods owned by the wife, and it is hereby agreed that this shall be a full, complete and entire settlement of the property, real and personal owned by said parties, and to be acquired by either of them in the future." Pages 1 and 2, Exhibit A.)

From the foregoing clear and unequivocal terms of the agreement Exhibit A it is evident that the intention of the parties in executing it was to terminate the state of common ownership existing between them. So much so that appellant endeavored to have it notarized and she received all and disposed of some of the properties assigned to her by virtue thereof.

There is no merit in appellant's claim that a judicial liquidation is necessary at least for the purpose of dividing the properties, not enumerated in the agreement Exhibit A, between appellee and the children. There is no law which requires the appellee to give to his children any share of his properties. Section 9 of Act 2710 merely provides that the bonds of matrimony shall not be considered as dissolved with regard to the spouse who has not delivered to his legitimate children within one year after the decree of divorce the equivalent of what would have been due to them as their legal portion if said spouse had died intestate. But in the present case, by virtue of Executive Order No. 141, the bonds of matrimony of the spouses have already been dissolved from the time the decree of divorce became final (Sec. 11, Ex. Or. No. 141). There is no need of the delivery of the so-called children's share in order to have the bonds of matrimony dissolved. Moreover, the children of the appellant and appellee are not a party in this case and appellant is not their guardian. She has no legal right to speak for them. Lastly, it being admitted that the share of the children is commingled with that of the appellee and that they are under the custody of the latter, there seems to be no reason for the separation of the children's share sought for.

Under the second assignment of error it is claimed that Exhibit 1 does not evidence a renunciation by appellant of the three Quezon City lots. Counsel argued that appellee himself admitted that there was no agreement of renunciation of the three lots embodied in any writing after the liberation and not even in Exhibit 1; that this exhibit did not expressly embody such renunciation but the renunciation of the repurchase not only of the three vacant lots in Quezon City but also of the other three lots whereon the house was constructed; that it was but natural that appellee should repurchase the whole properties since he was the one who needed and obtained the money from the Tiongsons; that Exhibit 1 did not state a consideration for the renunciation; that appellee's admission is corroborated by his omission to make Exhibit 1 an actionable

document of his original and amended answer; and that the only evidence of the alleged renunciation was appellee's own testimony which is belied by the preponderance of evidence and is unworthy of belief.

The three vacant lots in Quezon City corresponded to the latter by virtue of agreement Exhibit A. According to the appellee, the same have been conveyed to him by the appellant for and in consideration of the sum of ₱80,000, Japanese war notes, and later on, of the sum of ₱2,000, Philippine currency. The first sum was received by the appellant during the Japanese occupation and the second at the time Exhibit 1 was executed. For this reason and there being no other properties to be divided between the spouses, the appellee refused to acknowledge Exhibit A before a notary public as requested by the appellant. And it is for this reason also why appellant renounced her right in the repurchase of the properties described in Exhibit 1 sold to the Tiongsons in a *pacto de retro* sale.

Appellant denied that she ever sold the aforesaid lots to appellee. She claimed that the amount of ₱80,000, Japanese war notes, was received by her to be returned to one Captain Adashima in order that appellee would be spared from further arrest and detention by said Japanese officer due to the former's failure to deliver a truck with tires, or in running condition, which he had sold to the aforementioned captain. She also claimed that she was tricked into signing Exhibit 1, the entire contents of which she did not read before signing.

The trial court after hearing the testimony of the parties on the foregoing opposing versions and relying on the provisions of Exhibit 1 ruled that the appellant has renounced her rights on said lots for valuable consideration. On this controversial point the decision appealed from made the following findings:

"It is, therefore, important that the court go into plaintiff's allegation that she neither transferred nor renounced in Exhibit 1 her rights to the three lots mentioned in Exhibit A.

"Plaintiff's testimony that she signed Exhibit 1 without reading the entire contents of the document, does not sound convincing. It must be noted that the said document was signed by the plaintiff and the defendant after they had been divorced. It is, therefore, most unnatural that the plaintiff should continue to repose implicit faith in the defendant at the time to such an extent that she would just sign a document without knowing its full import. The court has no doubt that the plaintiff is intelligent. She is a college graduate, was once a newspaperwoman, and has a perfect command of English and Spanish. It is inconceivable that a person of her intelligence and experience could be deceived into signing a document such as exhibit 1.

"Then, there is the fact that she even accompanied the broker and the defendant to the place of the vendees in Malolos, Bulacan. The plaintiff should have the chance during all that time to know what the whole transaction was all about.

"While the plaintiff admits having noticed before she affixed her signature on Exhibit 1 that lots Nos. 17, 18 and 19 were included in the sale, she nevertheless wanted the court to believe her that she signed the said document without knowing that in one of its paragraph she renounced 'all her rights and participation in the repurchase of any and all the above-described properties in favor of the vendor Ramon Villanueva.' She also emphasized that she did not know that the document she signed contained the following: '* * * and the vendors reserving to Ramon Villanueva alone, his heirs, assigns and executors, the right to repurchase the whole of the properties herein sold within one year from the date of this instrument'."

"Exhibit 1 contains only two pages of terms and conditions written double space. The two portions of Exhibit 1 quoted above are immediately below the paragraph which makes mention of lots Nos. 17, 18 and 19 which the plaintiff admits having seen included in the document. It is, therefore, quite strange that she should fail to see the said two portions which vitally affect her rights. If Exhibit 1 were very long, consisting of many pages, perhaps plaintiff might find excuse in failing to notice the lines quoted above. But the fact is, exhibit 1 can be read in less than two minutes.

"In order to impugn the validity of the renunciation contained in Exhibit 1, the plaintiff takes advantage of the fact that the defendant could not produce any receipt for the ₱2,000 which he said he paid her in consideration of the renunciation in defendant's favor. The fact that the plaintiff signed Exhibit 1 shows that the consideration for the renunciation was given her and that she was satisfied with it.

"While it is true that Exhibit 1 is principally a deed of sale executed by the plaintiff and the defendant on the one hand and the Tiongsons on the other, in the opinion of the court, there is nothing illegal that the said document should contain a paragraph or paragraphs about a renuncition of the rights of one of the vendors to the repurchase of the property sold. If the document was executed in accordance with law, it is perfectly valid with respect to matters contained therein.

"Any allegation of fraud or deceit in the preparation of Exhibit 1 could not be substantiated by a mere testimony of the complaining party that she did not know what the document she signed contained. More so when the document is a public instrument." (Pages 11–12, Record on Appeal.)

The factual findings of the trial court on the renunciation of the appellant for valuable consideration and concerning appellant's full knowledge of the contents of Exhibit 1 before she signed it were made upon the conflicting testimony of the opposing witnesses and based in a large measure on their credibility. There being no showing in the record of any clear error committed by the trial court in the appreciation of the oral evidence and considering its advantageous position to gauge the credibility of the witnesses, we find no reason to disturb said findings of fact.

The findings and holdings of the trial judge hereinabove quoted, which we believe to be correct and well taken, sufficiently refute the arguments of the appellant adduced under the second assignment of error. We may add,

however, that appellee has satisfactorily explained that it was no longer necessary to have a separate agreement of renunciation. In fact, by the terms of Exhibit 1 the appellant has already renounced all her rights over the six lots. It would have been superfluous to execute another document expressly renouncing three of the same lots. The appellant was asked to sign Exhibit 1 to dispel all doubts of the vendee, Mr. Tiongson, as to the fact that the appellant had no longer any interest in the properties offered for sale. The stipulation of renunciation over the right of repurchase removed all clouds from the title of the appellee as sole owner. It can be gleaned from it that the intention of the parties was that the appellant would in the future cease to have any right over all or any of the properties conveyed by virtue of Exhibit 1.

The motion for new trial was correctly denied by the court below. In spite of appellant's denial, said court found out that she had renounced the lots in Quezon City for and in consideration of the sums of ₱80,000, Japanese war notes, and ₱2,000, Philippine currency. This is supported by the fact that she later on renounced all her rights over said lots upon executing Exhibit 1. In view of the conclusions of the lower court over the matter, with which we concur, we opine, and so hold, that the alleged newly discovered evidence, if admitted, would not alter the result of the case.

The judgment appealed from is hereby affirmed, with costs.

Reyes and *Borromeo, JJ.*, concur.

Judgment affirmed.

[No. 2531-R. July 11, 1949]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* VIVENCIO LASTIMOSA and LUCIO GUIRAL, defendants and appellants.

CRIMINAL LAW; SERIOUS PHYSICAL INJURIES; LOSS OF TEETH, PERMANENT DEFORMITY.—The loss of one cuspid and two bicuspids is such a physical deformity as would bring the case within the purview of article 263, paragraph 3 of the Revised Penal Code. "The injury contemplated by the Code is an injury that cannot be repaired by the action of nature, and if the loss of the teeth is visible and impairs the appearance of the offended party, it constitutes a disfigurement. The fact that he may, if he has the necessary means and so desires, have artificial teeth substituted for the natural teeth he has lost does not repair the injury, although it may lessen the disfigurement. The case of a child or an old person is an exception to the rule."

APPEAL from a judgment of the Court of First Instance of Surigao. Bayona, J.

The facts are stated in the opinion of the court.

Sisenando Villaluz for appellants.

First Assistant Solicitor General Roberto A. Gianzon and *Solicitor Jaime de los Angeles* for appellee.

DE LEON, *J.*:

This is an appeal to reverse the decision of the Court of First Instance of Surigao finding appellants guilty of the crime of serious physical injuries and sentencing each of them to an indeterminate penalty of from 6 months and 1 day to 2 years, 11 months and 10 day of *prisión correccional* and to pay the cost.

It appears that appellant Vivencio Lastimosa, a labor leader, was owner of a dancing hall situated near the water-front within the municipality of Surigao, Province of Surigao. His co-appellant Lucio Guiral was employed by him as a ticket collector. A certain Teofilo Aguanta was also in his employ in the capacity of bookkeeper and bodyguard.

In February of 1947, Lastimosa approached Sao Leong Kang, a Chinaman engaged in buying and selling copra in the aforesaid municipality, and requested him to be one of the bondsmen for the provisional release of a certain Bienvenido Pareja, who was then detained on a charge of murder. Because Kang turned down his request, Lastimosa disgustedly left him. A few days later, Lastimosa returned to Kang this time to ask him to contribute ₱100 with which to help defray the services of a lawyer who would defend Pareja. Again Lastimosa became quite disgusted, because this rich Chinese merchant contributed only one-half of the amount solicited.

In September 1947, Kang's copra was to be loaded on a foreign boat which was then anchored at the wharf of Surigao. Lastimosa approached Kang and asked that the laborers affiliated to his union, the Liberal Labor Union, be given the job of loading his copra. Kang informed him that he had already made arrangement for that purpose with the other union, the Surigao Labor Union, but suggested to him to arrange with the leader of the latter union, so that his laborers could undertake half of the job. Whether Lastimosa followed the suggestion or not, the record does not show, but the fact appears that Lastimosa's labor union did not handle even a part of said loading job.

On October 19, 1947 at 2 p.m., appellant Lastimosa with his bookkeeper and bodyguard Teofilo Aguanta went to the store of Kang for the purpose of borrowing the latter's jeep. Kang told him that his vehicle was out of order and that he had, on the same ground, denied similar request of some politicians. Lastimosa angrily told Kang that he should not compare him with politicians, as he had nothing to do with them. Then, further losing control

of his temper, he told Kang: "Do you believe that what really belongs to you really belongs to you? I can make all your things disappear in one minute." Kang pleaded that for the sake of their friendship, he should desist from carrying out any such intention. Fearing he might lose his ₱300,000 worth of copra, Kang decided to see Major Rodriguez of the MPC of Surigao for protection. Not finding said major and not having secured any assurance of police protection, Kang was so worried that that night, he could not sleep. Early the following morning, he hurriedly went to the office of the provincial fiscal and denounced Lastimosa for grave threats. The fiscal issued a subpoena, citing Lastimosa and his bodyguard Teofilo Aguanta to appear before him on October 22, 1947 at 8 a.m., for an investigation of the charges of threats filed by Kang.

Just on the eve of the investigation, that is on October 21, 1947 at 4 p.m., Lastimosa met Juan Felias and Juan Catin and told them that they should go the following morning at 6 o'clock to the provincial building, there to witness him box Kang. Asked why he was going to do so, he told them that Kang, without any valid reason whatsoever, denounced him to the fiscal.

Effectively on October 22, 1947 at 8 a.m., Juan Catin went to the provincial building of Surigao to witness what Lastimosa told him he would do. Catin stood under an acacia tree across the street and in front of the provincial building. From that vantage position, Catin saw the following: Appellant Lucio Guiral was on the balcony near the stairs of the provincial building, together with the wife of appellant Lastimosa. After a short while, Fiscal Andaya and Chinaman Kang arrived in the jeep of the latter. The fiscal then alighted from the jeep and Kang proceeded to the post-office nearby. A few minutes later, Kang returned and parked his jeep in front of the old provincial buiding. At this juncture, Lastimosa moved across the street to the bell tower near the stairs of the provincial building, and when Kang was ascending the stairs, he (Lastimosa) nodded at Lucio Guiral who was then at the head of the stairs. All of a sudden, appellant Guiral called Kang in a loud voice while Kang was on the second step of the stairs and when Kang turned to the right, Guiral boxed him on the face causing him to fall to the ground. Then Guiral jumped to the ground and mounted on Kang, giving him more blows which finally rendered him unconscious. Suddenly, someone shouted "Help, Kang is dead." At this juncture, Policeman Dandan rushed to the scene of the fight and separated Guiral and Kang. When Kang was able to stand up, he noticed that his nose and mouth were bleeding and that some of his teeth were missing, so he proceeded to the house

of Dr. Briones for treatment. Because Doctor Briones found that blood did not cease to flow from Kang's mouth, a dentist, Dr. Flora Andaya-Villareal, was summoned. It was found out that the cuspid and first bicuspid of the upper left gum of Kang were forcibly uprooted.

According to Doctor Briones, the following injuries were sustained by Kang:

"(1) Wound, lacerated, inner upper lip, left.—on the inner side of the upper left lip are two wounds corresponding to the left upper canine and first bicuspid teeth. That corresponding to the canine tooth is 1½ cm. long while that corresponding to the first bicuspid is ½ cm. long, each of them is ½ cm. wide, 3 mm. deep, bleeding with irregular undermined edges. The corresponding lip is swollen, tender, warm and reddish blue in color. The left upper canine and first bicuspid teeth are missing and their respective sockets are bleeding and the corresponding gum is swollen, tender and lacerated.

"The nose is bleeding due to the lacerated wounds thereat; and the nose is swollen, tender and reddish blue in color.

"(2) Contusion, multiple (left parietal, face, chest, back, right knee and both forearms). On these portions of the body are swollen areas, tender, warm and reddish in color. On those in the forearm and right knee are abrasions.

"Due to the involvement of the teeth and the continuous bleeding of the gum, a dentist was called whose certificate is hereto attached.

"It will take twenty eight days for all these injuries to heal and medical and dental treatments are necessary for at least fifteen days and will incapacitate him for at least fifteen days." (Exhibit B, p. 3. List of Exhibits)

The certificate issued by Dr. Flora Andaya-Villareal reads:

"This is to certify that I have attended to the treatment of Mr. Sao Liong Kang, a Chinaman of Surigao, Surigao and found the following:

'1 Two teeth were missing. The cuspid and the first bicuspid teeth from the upper left side of the mouth.

'2. The lips and gum on the region of the missing teeth are swollen, tender, lacerated and bleeding.

'3. The patient is having hemorrhage and blood clotting is covering the socket and surrounding region of the missing teeth.

'4. The socket of the cuspid tooth showed that the tooth (cuspid) has been forcibly uprooted.

'5. Detached piece of bone about the size of a grain of corn was found and removed by me from the socket of the cuspid teeth.

'6. On the gum corresponding the bicuspid tooth, a cut was found which to my opinion must have been caused by a sharp object. The cut was also bleeding profusely.

'7. The injury of this kind in the socket of the cuspid tooth will take from 5 to 8 months to recover or even years to person of poor health. Reasons for this is that, bones grow very slow especially if calcification process is poor." (Exhibit C, p. 4, List of Exhibits)

While appellant Guiral admitted having boxed Kang in the morning in question, he, however, claims that he did so, because on the night of October 19, 1947, while he and his wife were walking from the Waling-Waling restaurant, and on passing in front of the house of Kang, he noticed Kang following them and aiming a revolver at his back; that he was so afraid he could not say anything; that when he met Kang on the stairs of the provincial building on October 22, he asked why he aimed his revolver at him the other night; that Kang angrily answered him saying "what of it? You complain against anybody"; that provoked by such attitude and fearing that Kang had a revolver with him, he knocked him down with his fist. He further claimed that Lastimosa had no participation whatsoever in this fistic incident.

We agree with the lower court that the foregoing version of Guiral is utterly untenable. There was no showing of any motive whatsoever for the threat allegedly made by this Chinaman on the night of October 19, 1947. His story —as to how he was scared when he saw Kang pointing his gun at his back, how his wife ran away leaving him behind—sounds to us like a *tartar* tale. Again, in his affidavit, Exhibits D and D–1, Guiral stated that the reason why he maltreated Kang on the 22nd was to avenge the threat made by Kang on October 19, 1947, while at the trial, he claimed that he hit Kang on the morning of October 22, because of his challenging attitude. Such an inconsistency is an indication that Guiral was not telling the truth. Lastly, even granting that Kang had in truth challenged him to complain before any authority, such was no justification for the attack made upon him.

Appellant Lastimosa, besides merely denying the testimonies of Juan Catin, Juan Felias and the offended party Kang, claims that the evidence of record is insufficient to warrant his conviction. We have carefully scrutinized the evidence of record and have found nothing which may vitiate the veracity of the witnesses for the prosecution. His Honor has seen said witnesses testify in court and has given them full faith and credit. The record shows no compelling reason why we should disturb His Honor's appreciation of the veracity of said witnesses. The whole of their testimonies constitutes a strong chain of circumstantial proofs, convincingly showing that appellant Lastimosa was the mastermind and that between him and his employee Guiral, there was a pre-conceived plan, unity of purpose, and conspiracy to commit the crime under prosecution. Such circumstances are: (1) On four different occasions prior to October 22, 1947, Lastimosa failed to secure the several favors he asked of Kang. On the last occasion, he became so disgusted that he threatened to destroy Kang's life and property; (2) In view of Las-

timosa's threats, Kang filed charges against him with the fiscal. It was for the investigation of said charges that Kang and Lastimosa went to the provincial building on the morning of October 22, 1947; (3) Just the day prior to the date set for the said investigation, Lastimosa invited Juan Catin and Juan Felias to go to the provincial building the following morning to witness him box Kang; (4) When Kang was on the way up the stairs of the provincial building, Lastimosa was seen by Catin nod at Guiral and immediately thereafter the latter attacked Kang; and (5) Immediately after Guiral and the offended party were separted by a policeman, Lastimosa approached Kang and twisted the latter's hands.

Counsel maintains that the fact that the assault was committed in a public place shows the absurdity of a preconceived evil design, contending that "people who are nursing hatred and illwill against others do not announce their intention to the four wings of heaven or shout them from the rooftops." Counsel has apparently lost sight of the fact that the main purpose of the assault was to subject Kang to public contempt and ridicule. It was for this reason that the day just before the commission of the crime, Lastimosa invited some friends to witness the incident. To carry out his purpose, therefore, it was necessary that the offense be committed in a public place and in the presence of third persons. Moreover, if it be a truism that malefactors always seek to accomplish their designs by dark and sinister methods, then there will be rare occasion for us to read and hear of the commission of more serious offenses, such as those that recently occurred in the City Hall of Manila, as well as in other public places.

In an effort to minimize their criminal responsibility, appellants tried to establish that the teeth that Kang lost were artificial ones. This pretense is conclusively belied by the testimonies of Dr. Briones and Dr. Flora Andaya-Villareal and their respective certificates quoted above.

Counsel further contends that the loss of one cuspid and two bicuspids is not such a physical deformity as would bring the case within the purview of article 263, paragraph 3 of the Revised Penal Code, and that said deformity, if at all, cannot be considered a permanent one, because it can be remedied by dental science. It is true that in the cases of People *vs.* Medina, G. R. No. 32113 and People *vs.* Rodas, G. R. No. 31807, it was held that there was no disfigurement because the injuries were not permanent, since the teeth that were broken out could be substituted with artificial ones. These cases were, however, overruled by the case of People *vs.* Balubar, 60 Phil., 698, which held that the ruling in the aforecited Rodas and

Medina cases was not a correct interpretation of the law, the Supreme Court in *banc*, stating:

"The injury contemplated by the Code is an injury that cannot be repaired by the action of nature, and if the loss of the teeth is visible and impair the appearance of the offended party, it constitutes a disfigurement. The fact that he may, if he has the necessary means and so desires, have artificial teeth substituted for the natural teeth he has lost does not repair the injury, although it may lessen the disfigurement. The case of a child or an old person is an exception to the rule."

That the loss of one cuspid and two bicuspids has rendered physical deformity impairing the appearance of Kang is shown by the folowing finding of the trial judge:

"The court has observed, during the trial that whenever Sao Leong Kang spoke in the course of his testimony, apparent ugliness was visible in his mouth for the absence of the cuspid and first bicuspid teeth on his upper gum * * * (p. 32, Dec.)."

Lastly, counsel contends that appellants were denied the right to the preliminary investigation as ordained by the Rules of Court. This contention is without merit, it appearing from page 2 of the record that appellants had waived their right to a preliminary investigation in the Justice of the Peace Court.

We are of the opinion that the judgment of conviction is sufficiently justified by the evidence of record. The Solicitor General, however, has observed that the mimimun penalty imposed by the trial court is above the range by one day while the maximum is below the range by one day.

For all the foregoing, the judgment appealed from is hereby affirmed with costs, with the modification that the penalty to be suffered by each of the appellants shall be from 6 months *arresto mayor* to 2 years, 11 months and 11 days, *prisión correccional.*

Concepcion and *Dizon, JJ.*, concur

Judgment modified.

[No. 2133–R. July 12, 1949]

LAURA PARAGAS, plaintiff and appellant, *vs.* NICOLAS PARAGAS, defendant and appellee

1. OWNERSHIP; EVIDENCE; DOCUMENTS, PUBLIC; ADMISSIBILITY IN EVIDENCE OF PUBLIC DOCUMENT; ACKNOWLEDGMENT, ITS PURPOSE.—"A public document duly acknowledged before a notary public, under his hand and seal with his certificate thereto attached, is admissible in evidence without further proof of its due execution and delivery until some question is raised as to the verity of said acknowledgment and certificate. One of the very purposes of requiring documents to be acknowledged before a notary public is to authorize such documents to be given in evidence without further proof of their execution and delivery." (Antillon *vs.* Barcelon, 37 Phil., 148, syllabus.) Hence the document (Exhibit A) in question having been

executed before a notary public, became a public document (Civil Code, Article 1216).

2. CONTRACTS; EXECUTION, REQUISITES OF; WHEN CONTRACTS ARE BINDING; CASE AT BAR.—According to the Civil Code, "contracts shall be binding, whatever may be the form in which they may have been entered into, provided that the essential conditions required for their validity exist," and "should the law require the execution of an instrument or any other special formality in order to make the obligations of a contract effective, the contracting parties may compel each other to comply with such formality from the moment in which consent has been given, and the other requirements for the validity of the contract exist." (Civil Code, Arts. 1278, 1279). In view of the nature of the contract entered into between V. P. and F. P., on the one hand, and L. P., the plaintiff herein, on the other, the same had to be reduced in writing in a public instrument because the object of the contract "is the creation, transmission, modification, or extinction of rights which affect real property." (Civil Code, Art. 1280.)

APPEAL from a judgment of the Court of First Instance of Pangasinan. De los Santos, J.

The facts are stated in the opinion of the court.

Leonardo Jimenez for appellant.
Fernandez, Unson & Patajo for appellee.

TORRES, *Pres. J.:*

This is an appeal by plaintiff from a judgment rendered by the Court of First Instance of Pangasinan, dismissing the complaint with costs against her, on the ground that defendant has a better right over the land involved in this litigation than the plaintiff who, "despite her knowledge that said property at the time of sale in her favor was in the possession of defendant, decided to purchase the same, knowing fully well that it would result in a court litigation which, in fact, she (plaintiff) initiated by filing a complaint on the same day of registration of her deed of sale."

There is no controversy about the identity of the land described in paragraph 2 of the complaint. According to the evidence of the plaintiff, Faustina Paragas inherited the parcel of riceland in question from her mother Dominga de la Cruz, who died in 1923. That piece of land was tilled, first, by Gregorio Paragas, and when Dominga de la Cruz, the mother of appellant died in 1923, it was then occupied by the tenant Pedro Manuel, husband of Laura Paragas. In 1932, tenant Pedro Manuel was replaced by Aquilino Cacatian who worked on the land from 1933 to 1942, and then in 1943 it was tilled by Nicolas Paragas, the defendant herein, who claims to be the owner of the land. From the time Faustina Paragas inherited that parcel of land from Dominga de la Cruz, she had been receiving her share of the products of the land from the various successive tenants, but the last

one, defendant Nicolas Paragas, refused to share with plaintiff Laura Paragas the products of the land, on the ground that he was the owner of the same. On November 9, 1946, by a public document registered in the Office of the Register of Deeds of Pangasinan, the land was sold by Victor Paragas and Faustina Paragas to plaintiff Laura Paragas (Exhibit A).

The theory of the defendant is that the parcel of land in question was originally owned by Saturnino de la Cruz and his daughter Dominga de la Cruz; that on or about May 28, 1919, by means of a private document Exhibit 4, they sold said parcel to Nicolás Paragas with right to repurchase the same within a period of ten years. The vendors failed to redeem the property within ten years, and defendant gave them an extension of another ten years accordingly. The second extension having expired without the vendors' having redeemed the property, the defendant acquired full ownership over the same. Defendant further alleges that from the date of the sale with right of repurchase on May 28, 1919, up to the present, he had been in continuous, uninterrupted, open and adverse possession of said property as owner.

In the light of the above conflicting claims, it is incumbent upon us to determine the validity of the documentary and oral proofs which each party has presented at the hearing of this case in support of their respective allegations. Through the testimonies of Victor Paragas, Aquilino Cacatían and Laura Paragas, the plaintiff described before the court how she became the owner of the parcel of land in question; that it was inherited by Faustina Paragas from her mother Dominga de la Cruz occupied by tenants who were tilling the land and shared with her the products of the same. By means of a document Exhibit A, which is admitted by the defendant to be a true copy of its original registered in the Office of the Register of Deeds of the province, it is shown that on November 9, 1946, Victor Paragas and Faustina Paragas, in consideration of the sum of ₱100.00, Philippine currency, paid by Laura Paragas, married to Pedro P. Manuel, sold, transferred and conveyed by absolute sale to said Laura Paragas, her heirs, successors and interests, the parcel of land described therein, free from any encumbrance. Said exhibit having been executed before a notary public, became a public document (Civil Code, article 1216). "A public document duly acknowledged before a notary public, under his hand and seal with his certificate thereto attached, is admissible in evidence without further proof of its due execution and delivery until some question is raised as to the verity of said acknowledgment and certificate. One of the very purposes of requiring documents to be acknowledged before a notary public is to authorize such docu-

ments to be given in evidence without further proof of their execution and delivery." (Antillon *vs.* Barcelon, 37 Phil., 148, syllabus.)

In the case before us, the authenticity of the original of Exhibit A, kept in the Office of the Register of Deeds, has not been denied. Counsel for defendant, when Exhibit A was introduced in evidence said: "With respect to Exhibit A, we have no objection * * *" and, therefore, the court admitted the same. The evidence introduced by plaintiff is reinforced by a document written in the Pangasinan dialect, and entitled "Inventario Testamento," dated February 28, 1904. On the third and fourth pages of which, there appears the following item:

"We have an adopted child named Dominga de la Cruz, and I gave her also a share, of a riceland, situated in the barrio of Basing. The superficial extension of said land has not been mentioned because it appears in its boundaries. Bounded on the North by Toribio Torio and Petrona Escaño, East by Petrona Escaño; South by Sotero Paragas and Esteban Paragas; and on the West by Hermenegildo Manuel, and assessed at ₱14.00." (English translation.)

We do not doubt the identity of the lot if We take into consideration that the description given in Exhibit D was made as of 1904, while the description is Exhibit A refers to the boundaries of the land on November 9, 1946.

Referring now to the evidence of defendant, it appears that he relies entirely on the validity of a private document marked Exhibit 4, executed on May 28, 1919, which refers to the sale with right of repurchase of two parcels of land, one of an area of 1940 square meters, and another with an area of 1,470 square meters, which Saturnino de la Cruz and his daughter Dominga de la Cruz sold to Nicolás Paragas for the sum of ₱140 with right of repurchase to be exercised for a period of ten years. Apparently, the vendors being illiterate could not sign the document and thus their supposed thumbmarks had been stamped over their typewritten names. There were supposed to be two witnesses to this transaction, but one, Arcadio de Vera, is also an illiterate man, while the other, Telesforo Fernandez, died before the institution of this action, for which reason and notwithstanding the statement made by the lower court to the contrary, he could not give his testimony on the matter.

Upon a comparison between the two documents, Exhibit A of plaintiff and Exhibit 4 of defendant, there is not the least doubt that Exhibit 4 must yield to Exhibit A. According to the Civil Code, "contracts shall be binding, whatever may be the form in which they may have been entered into, provided that the essential conditions required for their validity exist," and "should the law require the execution of an instrument or any other

special formality in order to make the obligations of a contract effective, the contracting parties may compel each other to comply with such formality from the moment in which consent has been given, and the other requirements for the validity of the contract exist." (Civil Code, Article 1278, 1279.) In view of the nature of the contract entered into between Victor Paragas and Faustina Paragas, on the one hand, and Laura Paragas, the plaintiff herein, on the other, the same had to be reduced in writing in a public instrument because the object of the contract "is the creation, transmission, modification, or extinction of rights which affect real property." (Civil Code, Art. 1280.)

On the other hand, Exhibit "4" of defendant being only a private document and showing on its face that its authenticity not having been satisfactorily proven, it is impossible for us to make a just adjudication of its probative value.

In order to establish his claim of possession and ownership, the defendant, by his Exhibits 1, 2 and 3, tried to show that he had paid land taxes over the land in question corresponding to the years 1935, 1936, 1937, 1938, 1939, 1940, 1946 and 1947. Upon close examination of Exhibit 1, it appears, however, that the taxes for 1935 to 1936 were paid by defendant on November 4, 1946; the taxes for 1937 to 1940 were according to Exhibit 2, paid by him on November 4, 1946, and the taxes for 1941 to 1946, were according to Exhibit 3, paid by appellant on November 11, 1946. The defendant would have the court believe that those taxes were paid by him at the proper time, when in fact they were paid only on November 4 and 11, 1946, respectively. In this connection, it may not be amiss for us to state herein that according to our jurisprudence, the payment of land taxes is not evidence of ownership of land (Evangelista *vs.* Tabayuyong, 7 Phil., 607; Casimiro *vs.* Fernandez, 9 Phil., 562; Elumbaring *vs.* Elumbaring, 12 Phil., 389).

Furthermore, tested by the rule established by the Civil Code in paragraph 2 of Article 1473, to the effect that "ownership (of immovable property) shall belong to the person acquiring it who first recorded it in the Registry," and inasmuch as the record fails to show that defendants acquired the land by prescription, it is apparent that this controversy must be decided in favor of the appellant who, as already stated, registered Exhibit A in the Office of the Register of Deeds while defendants did not register their Exhibit 4.

By virtue of all the foregoing, and inasmuch as in our opinion, the evidence of plaintiff-appellant has satisfactorily shown that she purchased the land in question from Victor Paragas and Faustina Paragas who inherited the

same from her mother and has been in continuous and uninterrupted possession of the same, either by herself or through tenants, it is undeniable that she is the legal and absolute owner of the land described in paragraph 2 of her complaint. Therefore, with reversal of the judgment appealed from, it is hereby ordered that another one be entered in the record of this case in accordance herewith, without pronouncement as to costs.

Endencia and *Felix, JJ.*, concur.

Judgment reversed.

[No. 2861-R. July 13, 1949]

MACARIO CUBILO, plaintiff and appellee, *vs.* ANICETO CAINGHUG, defendant and appellant

SALE; RECONVEYANCE; HOMESTEAD; SECTION 119, ACT NO. 14; PURPOSE OF THE LAW; REPURCHASE NOT BY LEGAL HEIRS OF HOMESTEADER.—The reconveyance sought by the plaintiff is not in accordance with the purpose of the law, that is, to allow him "to preserve and keep in the family of the homesteader that portion of public land which the state has gratuitously given to him," because, according to his own evidence and admission made in open court, the ones interested in the reconveyance are the daughter of his daughter-in-law, who is furnishing him the money with which to repurchase, and the brother of said daughter-in-law who is the one really interested in the repurchase.

APPEAL from a judgment of the Court of First Instance of Leyte. Enriquez, J.

The facts are stated in the opinion of the court.

Jose A. Conte for appellant.

Antonio Montilla for appellee.

RODAS, *J.:*

On July 7, 1941 Aniceto Cainghug purchased from Macario Cubilo and his wife Evarista Piesas a homestead described in original certificate of title No. 1149, issued in their name. In civil case No. 97, of the Court of First Instance of Leyte, instituted by Macario Cubilo through some of his children against said Aniceto Cainghug for the purpose of compelling the latter to allow him and his children to repurchase said homestead, decision was rendered ordering defendant Cainghug to reconvey to them said homestead, from which decision, appeal was taken to this Court.

Vicente, one of the children of Macario Cubilo, as early as the year 1939, went to see Atty. Bernardo Closa for advice as to how to collect from one Yepes the sum of ₱1,100 which was the balance of the purchase price of his father's homestead sold to said Yepes and to whom the latter was then owing ₱500. Yepes was not willing to pay said balance of ₱1,100, because the sale in his favor

could not be carried out due to the prohibition provided for in section 118 of the Public Land Act No. 141. As Vicente was badly in need of money to rehabilitate his fishing nets and boat he wanted to sell said homestead at any rate. Attorney Closa helped him secure a loan from the Philippine National Bank in the sum of ₱200, but because of said loan, which was secured without Yepes knowledge or consent a litigation ensued for the collection of the latter's credit. Macario Cubilo who was thus sued found a buyer of his homestead in the person of Aniceto Cainghug, provided a permit was secured from the Secretary of Commerce and Agriculture, and Attorney Closa had to prepare the necessary application (Exhibit 9) for the sale of just one-half of the land. Cainghug, however, was not willing to buy one-half but the whole, and so another permit (Exhibit 7) for the sale of the whole homestead had to be secured. Closa prepared the corresponding deed of sale of the whole homestead in favor of Cainghug for 2,000, the price already agreed upon. Macario Cubilo, in company with his attorney, Bernardo Closa, went to see Cainghug, but the latter, after reading said document, requested that some amendments be made among which was that the wife of Macario Cubilo be made a party to the contract. A new deed of sale was drawn, a true copy of which has been marked Exhibit 2, which deed the plaintiff, his wife and the witnesses thumbmarked and signed after it had been read to them in the local Visayan dialect at the request of Cainghug.

Out of the purchase price of ₱2,000, the debt to Yepes was paid and the complaint brought by the latter against Macario Cubilo was dismissed; the loan from the bank was likewise paid; and, the son of Macario Cubilo received ₱300 in payment of a certain piece of land which Macario sold belonging to the mother of his said son and which sum the latter used in rehabilitating his fishing nets and boat. Macario bought another piece of land and gave out a loan on another lot containing about three hectares by way of mortgage.

Aniceto Cainghug hired five laborers to till the portion of the land containing about eight or nine hectares which was clear and tillable, to clear a portion of about five hectares covered by shrubs and trees as well as another portion of about seven and one-half hectares of forest and big trees, paying ₱100 each, besides giving each of them a full grown carabao that cost him from ₱120 to ₱150 a head, having paid for one ₱190 and for two at ₱180 each or a total of ₱820 and the right to till and plant on the portion so cleared by each of them and to enjoy exclusively its produce for a period of three years. The fruits so harvested and enjoyed by said laborers amounted to ₱6,225 including

tobacco. This work was done by them during the Japanese occupation so that the whole land was cleaned, cleared and leveled at the time of the liberation.

In March, 1946, Victorio, another son of the plaintiff, Maxima, his daughter-in-law, and a Cebuano, Luis Caño as a witness, went to see Cainghug for the purpose of redeeming the land, but the latter refused to allow redemption, stating that he bought the land outright and showed them the document which they could not read. However, they showed Cainghug the sum of ₱2,050 with which to redeem the land and even counted it in his presence, but he refused just the same to accept it.

Cainghug admitted that the children of Macario Cubilo went to see him and offered to redeem one-half of the land but that he refused the offer and told them that he is willing to sell it now that it has been totally cleared and ready for cultivation for ₱10,000. Because of the refusal of Cainghug to allow the redemption of the land, Macario Cubilo instructed his children to file the corresponding action in court.

Although there is no dispute as to the execution of the deed of sale in favor of defendant and as to the adequacy of the purchase price, plaintiff contends that he did not intend to sell his homestead to Cainghug; that the understanding between them was that the transaction was only a mortgage; that he could redeem the land at any time he wishes and has the means to do so; that he did not authorize attorney Closa to ask permission to sell it from the Secretary of Commerce and Agriculture; that in fact there was no document of sale executed, except that he was made to thumbmark a piece of paper with some handwriting on it, the contents of which were not even read or explained to him; and that he had paid taxes on the homestead, which proves that he has not lost ownership thereof.

Victorio Cubilo, one of the children of Macario, testified that the original owner of the homestead in question was one Marcos Bañez who transferred it to his father, and the latter, with the help of his eight children, began to clean and clear the land since 1925; that after five years of hard work they succeeded in having the land ready for cultivation and in fact they began planting it in the year 1930; and that it is not true what is stated in their Exhibit B, the tax declaration of the homestead in question, that in the year 1937 a portion of about fourteen hectares thereof was still a forest. Macario Cubilo admitted that the money with which they intended to redeem the land belonged to the daughter of the daughter-in-law of the plaintiff (by a man other than plaintiff's son), and that the one interested in the redemption of said land is the brother of his daughter-in-law.

Predicated on the evidence above set forth, the trial judge rendered a decision, the dispositive part of which reads as follows:

"Tested by the foregoing criterion, the evidence adduced by the plaintiff fails to show that the contract had between them was merely that of mortgage. His declaration on the point is uncorroborated; the witnesses to the deed nor the notary public before whom it was acknowledged, were not presented as witnesses nor any explanation given why their testimony could not be secured. Besides, defense counsel does not even question the adequacy of ₱2,000 as consideration to an outright sale. The tax receipt, Exhibit C, does not improve plaintiff's case as the payments were made only on February 17, 1947, after this case had been filed. There has been no showing whatsoever that the plaintiff after the sale still considered himself owner of the land in question. On the other hand, the defendant took possession of the land, invested time and money in improving same, more than half of which was then forested in order to put the whole area under cultivation. He even resigned his position as postmaster so that he could devote his full time to the supervision thereof.

"Wherefore, the complaint is dismissed with costs against the plaintiff."

On motion of the plaintiff, the court reconsidered its decision, and reversing itself rendered another, the dispositive part of which reads as follows:

"Wherefore, judgment is rendered in favor of the plaintiff, ordering the defendant to reconvey the property described in Original Certificate of Title No. 1149, in favor of the plaintiff thereby reinstating the same, upon the latters' payment of ₱3,000 to the former plus notarial fees without pronouncement as to costs. The plaintiff's claim for damages is dismissed."

The appeal from the last quoted decision is predicated on three assignments of error which may be reduced to two, to wit: (1) for having misconstrued and misapplied section 119 of Act No. 141 to the instant case; and, (2) for fixing the sum of ₱3,000 as the redemption price.

Section 119 of Act No. 141 reads as follows:

"Every conveyance of land acquired under the free patent or homestead provisions, when proper, shall be subject to repurchase by the applicant, his widow, or legal heirs, within a period of five years from the date of the conveyance."

Applying its provisions, the Supreme Court in the case of Pascua *vs.* Talens, G.R. No. L-343, said:

"It is well-known that the homestead laws were designed to distribute disposable agricultural lots of the State to land destitute citizens for their home and cultivation. Pursuant to such benevolent intention the State prohibits the sale or encumbrance of the homestead (Section 116) within five years after the grant of the patent. After that five-year period the law impliedly permits alienation of the homestead; but in line with the primordial purpose to favor the homesteader and his family the statute provides that such alienation or conveyance (Section 117) shall be subject to the right of repurchase by the homesteader, his widow or heirs within five years. This section 117 is undoubtedly a compliment of section 116. It aims to preserve and keep in the family of the homesteader that portion of

public land which the state had gratuitously given to him. It would, therefore, be in keeping with this fundamental idea to hold, as we hold, that the right to repurchase exists not only when the original homesteader makes the conveyance, but also when it is made by his widow or heirs. This construction is clearly deducible from the terms of the statute."

The difference between said case and the case at bar lies in: (1) That the one interested in the repurchase sought is not Macario Cubilo and his wife Evarista Piesas nor the children of the former by his former wife (Macario Cubilo and Evarista Piesas are childless), but the daughter of the daughter-in-law of Macario Cubilo who is furnishing the money with which the repurchase is sought to be made, or the brother of his daughter-in-law who is interested in the repurchase, according to Macario's testimony.

"Q. You said that you have now the money with which to redeem that land?—A. I have.

"Q. Where did you get that money?—A. From my daughter-in-law who has a daughter who can dispose of some amount.

"Q. Therefore, it is the brother of your daughter-in-law who desires to redeem that land. Is that true?—A. That is true." (p. 14, t. s. n., Delima.)

(2) That at the time the sale was made to the defendant, the land sold which has an area of 21.4633 hectares only had a tillable portion of about nine hectares, and that the defendant had to spend about ₱7,312.50 in order to have the remaining portion cleared, cleaned, levelled and tillable; and

(3) That the plaintiff besides paying urgent obligations with the proceeds of the sale, including the sum of ₱300 he owed his children for the land of their mother sold by him and with which his son Vicente rehabilitated his fishing nets and boat was able to acquire several pieces of land, one of them with an area of over three or about four hectares.

While the last two reasons above-mentioned may be considered as purely grounds of equity, for they only go to show that a reconveyance would redound to the exclusive benefit of those interested in it, it would work a great injustice to the defendant who would lose all the money he had invested in developing said land amounting to ₱7,312.50 and enrich the former to that extent at the expense and to the prejudice of the said defendant. The first reason is clearly a legal ground which shows that the reconveyance sought by the plaintiff is not in accordance with the purpose of the law, that is, to allow him "to preserve and keep in the family of the homesteader that portion of public land which the state has gratuitously given to him," because, according to his own evidence and admission made in open court, the ones interested in the reconveyance are the daughter of his daughter-in-law, who is furnishing him the

money to repurchase, and the brother of said daughter-in-law, who is the one really interested in the repurchase.

In view of the foregoing, the court reverses the decision appealed from and absolves the appellant from the complaint, with costs against the appellee.

Jugo and *De la Rosa, JJ.*, concur.

Judgment reversed; appellant absolved from the complaint.

[No. 2474–R. Julio 14, 1949]

PÍO DELIMA, demandante y apelado, *contra* EUTIQUIO BOYLES, y otros, demandados; NICOLASA ROMAN, viuda de Emilio del Valle Sr., y otros, demandados y apelantes.

1. CONTRATOS; SU INTERPRETACIÓN; INTENCIÓN DE LAS PARTES; PRUEBAS.—Cuando se plantea la cuestión sobre la verdadera interpretación de un documento la presentación de las pruebas testificales para acreditar el verdadero convenio, voluntad o intención de las partes, es perfectamente permisible. Para cuyo efecto, deberá tenerse en cuenta la intención de sus otorgantes (art. 60, Regla 123, Reglamentos de los Tribunales), y podran "explicarse las circunstancias en que se otorgó, inclusive la situación del objeto sobre que versa el documento y la de las partes que la otorgaron" (art. 61, Regla 123, *supra*).
2. ID.; VENTA CON PACTO DE RETRO; SU NATURALEZA Y EFECTO JURÍDICO.—Una venta con pacto de retro transmite el dominio o título legal al comprador. Durante la pendencia del derecho de retracto, el vendedor no tiene sobre la cosa vendida más que el derecho de recuperarla, que se reservó, si cumple con los requisitos legales. Si el vendedor permite que el período de recompra transcurra sin que él ejerza su derecho de retracto, el comprador adquirirá el dominio de la cosa vendida y aquél perderá todos sus derechos sobre ella.
3. ID.; PROMESA DE VENTA; NATURALEZA Y EFECTO JURÍDICO.—La claúsula del documento en cuestión, que dice: "de lo contrario se convertirá en venta definitiva por la suma de setecientos cincuenta pesos (₱750), moneda filipina, debiendo por tanto el Sr. E. Boyles aumentar al vendedor la suma de ₱150.00", es a lo más, una promesa independiente y condicional de venta y no da a la transacción principal, contenida en el Exhíbito A, el carácter o naturaleza que los apelantes tratan de atribuirla. Siendo unilateral dicha promesa de venta era necesario que el aceptante resolviese primero hacer la compra para que la venta se perfeccionase y consumase. Es más, la promesa de venta no transmite título o dominio sobre la propiedad y sólo concede el derecho de reclamar el cumplimiento de lo pactado.
4. ID.; ANTICRESIS; PRESCRIPCIÓN; JUICIO DECLARATORIO; PRESCRIPCIÓN ES MATERIA EXTRAÑA EN UN JUICIO DECLARATORIO.—La pretendida prescripción adquisitiva, sobre ser materia extraña en un juicio declaratorio, carece de base legal. Cuando un acreedor hipotecario adquiere posesión, con consentimiento del deudor, como en el caso de autos, los derechos de las partes se determinan con arreglo a los principios aplicables al contrato de anticresis (Macapinlac *contra* Gutierrez Repide, 43 Jur. Fil., 808). Los contratos de préstamo con garantía, en virtud de los cuales un deudor cede a su acreedor su propiedad raiz para que éste la usufructue mientras no se salda la deuda, destinándose

sus frutos al pago de los intereses, caen bajo las disposiciones de los artículos 1881 a 1886 del Código Civil, que tratan del contrato anticrético, puesto que tienen las mismas características jurídicas del contrato de anticresis (Santa Rosa *vs.* Nable, 36 Off. Gaz., 2724). El acreedor en tales casos no podrá mediante prescripción adquirir el dominio del inmueble recibido como garantía; y la razón es porque entró en posesión del mismo no a título de dueño sino de acreedor con derecho sólo a cobrar su crédito, o sus intereses, de los frutos del inmueble puesto en garantía (Barretto *contra* Barretto, 37 Jur. Fil., 246–7).

APELACIÓN contra una sentencia del Juzgado de Primera Instancia de Bohol. Rodriguez, J.

Los hechos aparecen relacionados en la decisión del Tribunal.

D. Anastacio A. Mumar en representación de los apelantes.
D. Diosdado Reyes Delima en representación de los apelados.

GUTIERREZ DAVID, *M.:*

En el mes de marzo de 1927, Pío Delima, por y en consideración a la suma de ₱600, otorgó a favor de Eutiquio Boyles el documento público, marcado Exhíbito A, que a continuación se transcribe:

Sepan los que la presente vieren:

"Yo, Pio de Lima, casado con Eufrasia Reyes, mayor de edad y residente en el municipio de Maasin, Provincia de Leyte, Islas Filipinas, hago constar por la presente que en consideración a la suma de (₱600), moneda filipina, que he recibido del Sr. Eutiquio Boyles, casado, mayor de edad y residente en este municipio de Ubay, Provincia de Bohol, Islas Filipinas, traspaso en calidad de hipoteca al citado Sr. Eutiquio Boyles, dos parcelas de terreno con toda la plantación de cocos situadas en la población de este municipio de Ubay, Provincia de Bohol, Islas Filipinas, cuyas descripciones son las siguientes: Primera Parcela, Reg. No. 7959. Norte, (antes Praxedes Escobilla) ahora Emilio del Valle; Este, calle Gomez; Sur, calle Rizal y Oeste, calle Connant y (antes Santiago Paler) ahora Blas Mendes. Contiene 90 arboles de cocos que ya dan frutos. Segunda Parcela. Reg. No. 6648. Norte, Son-ok River; Este, calle Gomez; Sur, calle J. Luna y Oeste, Marciano Garces. Contiene 15 arboles de cocos que ya dan frutos; los cuales terrenos están al presente libres de toda carga y gravamen, y fueron adquiridos por mí, en escritura privada de compra venta desde hace más de diez y ocho años.

"Entendiéndose, que si yo pagare o mandare pagar al referido Sr. Eutiquio Boyles la cantidad que arriba se menciona, ₱600.00, en o antes del término de cuatro años a contar desde el día en que el Sr. Boyles me envíe el molino marca "Perla" que le he encargado me lo compre en Cebú o en Manila, esta hipoteca quedará cancelada y sin ninguna efecto; de lo contrario se convertirá en venta definitiva por la suma de (₱750), moneda filipina, debiendo por tanto el Sr. E. Boyles aumentar al vendedor la suma de ₱150.

"Entendiéndose, además, que durante los cuatro años de hipoteca, el Sr. E. Boyles tendrá la posesión y usufructo de las dos parcelas citadas y sus mejoras o plantaciones, en compensación de no tener que pagarle el otorgante ningún interés por la cantidad recibida.

"Entendiéndose, además, que en el caso de que yo pudiere pagar la cantidad de ₱600 dentro del plazo convenido, el Sr. E. Boyles tendrá

la opción de comprar la parcela pequeña, Reg. No. 6648, con sus mejoras o plantaciones, en la cantidad de ₱200.

"Entendiéndose, además, que el Sr. E. Boyles pagará, durante el tiempo de la hipoteca, la contribución territorial correspondiente a dichas dos parcelas por su propia cuenta.

"Y entendiéndose, por último, que el Sr. E. Boyles podrá plantar cocos en los terrenos mencionados en este documento, los cuales deberán ser pagados por mí a razón de cinco pesos cada uno, si ya dan frutas y, si menos de eso, dos pesos, como también los demás gastos por las alambradas, postes y mano de obra en caso de que yo pueda pagarle la cantidad de esta hipoteca. Hago constar que el Sr. E. Boyles me entregó el día de hoy la suma de (₱50), moneda filipina, a cuenta de los ₱600 convenidos.

"En testimonio de lo cual, firmo la presente en el municipio de Ubay, Provincia de Bohol, Islas Filipinas, hoy 12 de marzo de 1927.

"(Fdo.) PIO DE LIMA
"(*Otorgante*)

"Firmado en presencia de:

"(Fdo.) MELQUIADES G. REYES
(*Testigo*)

"(Fdo.) AMALIO GUTANDA
(*Testigo*)

"Estoy conforme:

"(Fda.) EUFRASIA REYES
"(*Esposa del Otorgante*)"

(Sigue la ratificación)

Boyles entregó a Delima en el acto de firmarse dicho documento la suma de ₱50, y con el saldo se comprometió a comprar para Delima un molino de maíz, marca "Perla", en Cebú o en Manila. Después de comprado dicho molino, Boyles entregó a Delima la suma de ₱31.00 en 24 de abril de 1929 para completar los ₱600 a que se contrae el Exhíbito A.

Algún tiempo después del otorgamiento del Exhíbito A, Boyles traspasó a Emilio del Valle Sr. todos sus derechos adquiridos en virtud del documento Exhíbito A, otorgando al efecto el documento privado, marcado Exhíbito E, que a continuación se acota:

"Ubay, Bohol, I.F.
"Enero . . .

"Por la presente hago constar que con esta fecha he endosado al Sr. Emilio del Valle la hipoteca de los terrenos del Sr. Pio de Lima hipotecados al que suscribe por la misma suma de la hipoteca, o sean, (₱600), de los que ya he recibido a cuenta la suma de doscientos cuarenta y cinco pesos y 12 centavos (₱254.12); asimismo hago constar que desde el 1.° de Enero del presente año Sr. Emilio del Valle está autorizado en virtud de la presente á usufructuar los productos de los terrenos arriba mencionados y, por último, hago constar que los gastos por alambrar el terreno y por plantar cocos deberán ser apuntados en lista para reembolsar al Sr. del Valle al tiempo de su rescate.

"(Fdo.) E. BOYLES"

La posesión de las dos parcelas de terreno descritas en el Exhíbito A fué entregada a Boyles al otorgase el citado documento. Este, a su vez, la entregó a Emilio del Valle Sr. después de otorgado el Exhíbito E.

Emilio del Valle Sr. falleció en el año 1941, y la posesión de los terrenos a que se contraen los Exhíbitos A y E pasó a sus herederos, o sean, su viuda Nicolasa Roman, y sus hijos Rosario del Valle y Emilio del Valle Jr.

En o hacía el año 1946, Pío Delima ofreció a Eutiquio Boyles la suma de ₱600 en pago de la cantidad mencionada en el Exhíbito A, para recobrar la posesión y usufructo de las parcelas de terreno descritas en dicho exhíbito. Boyles aceptó dicha cantidad y, a su vez, la ofreció a los herederos de Emilio del Valle Sr. Estos se negaron a recibirla. En vista de su negativa, Pío Delima consignó dicha suma en el Juzgado de Primera Instancia de Bohol. No obstante dicha consignación, los herederos de Emilio del Valle Sr. insistieron en su negativa de aceptarla.

En 2 de diciembre de 1946, Pío Delima comenzó este recurso declaratorio bajo la Regla 66 de los Reglamentos de los Tribunales ante el mismo Juzgado de Bohol, nombrando a Eutiquio Boyles, Nicolasa Roman, Rosario del Valle y Emilio del Valle Jr., como demandados. En su demanda pide que sean interpretados: el documento Exhíbito A como contrato de anticresis, y el documento, Exhíbito E, como una mera cesión de crédito hipotecario.

Boyles presentó contestación admitiendo que el objeto e intención de él y Delima al otorgar el documento Exhíbito A eran para garantizar, mediante hipoteca de los terrenos de éste, el pago de una deuda de ₱600 contraída por dicho Delima y que la intención de él y del finado Emilio del Valle Sr. al otorgar el documento Exhíbito E, era la de ceder a dicho finado tan solo el derecho de cobrar de Pío Delima, como deudor, el importe del préstamo, con facultad de disfrutar la posesión y usufructo de las dos parcelas de terreno, dadas en garantía, mientras no se pague el importe del citado préstamo; y pidiendo que tales documentos sean interpretados a dicho tenor.

Los demás demandados, herederos del finado Emilio del Valle Sr., en su contestación, insisten en que el contrato Exhíbito A era de venta con pacto de retro de los terrenos descritos en el mismo, con un plazo de retracto de 4 años a contar desde la entrega de cierto molino de maíz al vendedor; que lo que Boyles vendió a Emilio del Valle Sr. era su derecho como comprador a retro, y que habiendo expirado el plazo de retracto, ellos, como causahabientes de Emilio del Valle Sr., se convirtieron en dueños absolutos de dichos terrenos, con derecho a disfrutar los productos de estos y a rehusar el pago ofrecido por el demandante. Alegan, como defensas afirmativas, entre otras, que la acción del demandante ya ha prescrito; que éste y el demandado Eutiquio Boyles estan en "estoppel" para variar el contenido de los contratos en cuestión; y que ellos han adquirido los terrenos descritos en el Exhíbito A por prescripción.

Después del juicio correspondiente, el Juzgado inferior falló el asunto declarando el documento Exhíbito A como uno de préstamo con garantía, o hipoteca equitativa, y el documento Exhíbito E como de cesión de un crédito garantizado con bienes raices. De dicho falló, los demandados, herederos de Emilio del Valle Sr., apelaron.

En apoyo de su recurso, contienden que el juzgado inferior erró: (1) al haber desestimado la objeción de los apelantes a la presentación por el demandante de pruebas orales para cambiar, modificar o alterar los términos claros contenidos en el documento Exhíbito A; (2) al haber declarado que el contrato Exhíbito A no es de venta con pacto de retro sino de préstamo con garantía; (3) al no haber declarado que los apelantes adquirieron título de propiedad sobre los terrenos en cuestión en virtud del documento Exhíbito A o por prescripción; (4) al haber declarado que el documento Exhíbito E es de cesión de derechos solamente y al no haber sostenido que los bienes raices cuestionados habían sido cedidos a su causante, Emilio del Valle Sr.; y (5) al haber declarado que el párrafo 4.º del Exhíbito A es nulo e ineficaz por falta de consideración.

El primer punto suscitado es: que el Juzgado inferior no debió de haber permitido las pruebas testificales del apelado que tendían a variar, alterar o cambiar los términos claros del contrato Exhíbito A. Argúyese que la demanda no contiene alegaciones de que hay ambiguedad o imperfección en el mencionado contrato, o de que hubo mutuo error en ambas partes al otorgarlo, o de que hubo fraude en su otorgamiento. Carece de mérito esta contención. En la demanda existen alegaciones de que el contrato (ahora Exhíbito A) contiene los elementos de una hipoteca y también los de un contrato de anticresis y, por tanto, admite dos interpretaciones; y de que el segundo párrafo de dicho documento contiene una estipulación que se encuentra comúnmente en una venta con pacto de retro y al propio tiempo contiene frases que no suelen usarse en las ventas a retro y mas bien en aquellos que se otorgan como garantía del pago de una deuda. La misma demanda dice que el documento cuestionado fué otorgado para garantizar un préstamo de ₱600 que el demandante había pedido y obtenido de Boyles en marzo de 1927. Además, la demanda pide que el citado contrato sea interpretado como uno de anticresis. Por otra parte, mientras que el demandado Boyles admite en su contestación que dicho contrato es de préstamo con garantía hipotecaria, conforme a la verdadera intención de las partes, los demás demandados, ahora apelantes, alegan que lo es de venta con pacto de retro. De modo que aquí se plantea la cuestión sobre la verdadera interpretación del documento aludido. A no dudar, la presentación de las pruebas testificales para

acreditar el verdadero convenio, voluntad e intención de las partes, es perfectamente permisible.

Por lo demás, siendo el objeto del juicio el de la debida interpretación de un contrato, deberá tenerse en cuenta la intención de sus otorgantes (artículo 60, Regla 123, Reglamentos de los Tribunales), y podran "explicarse las circunstancias en que se otorgó, inclusive la situación del objeto sobre que versa el documento y la de las partes que la otorgaron" (artículo 61, Regla 123, *supra*).

Pasemos ahora a la interpretación de la escritura Exhíbito A. Mientras el apelado contiende que la misma es contrato de anticresis, y el Juzgado inferior la calificó de préstamo con garantía hipotecaria, o hipoteca equitativa, los apelantes se aferran en que es de venta con pacto de retro.

En la escritura aparece que en consideración a la suma de ₱600, el otorgante hace constar que, traspasa "en calidad de hipoteca al citado Eutiquio Boyles" las dos parcelas de terreno etc. Cada vez que haga referencia a la transacción contenida en ella, la escritura emples la palabra: "hipoteca", pues en el párrafo 2.° dice: "esta hipoteca"; en el párrafo 3.°: "durante los cuatro años de hipoteca"; en el párrafo 5.°: "durante el tiempo de la hipoteca," Boyles pagará la contribución territorial; y en el párrafo 6.°: "en caso de que yo pueda pagarle la cantidad de esta hipoteca." Sobre la resolución del contrato, el documento reza: "Entendiéndose, que si yo pagare o mandare pagar al Sr. Eutiquio Boyles la cantidad que arriba se menciona, ₱600.00, en o antes del término de cuatro años a contar desde el día en que el Sr. Boyles me envíe el molino marca 'Perla' que le he encargado me lo compre en Cebú o en Manila, esta hipoteca quedará cancelada y sin ningún efecto." Ninguna de las palabras "vender", "comprar", "recompra", "retro", "retroventa", u otros vocablos similares, indicativos de la idea de una venta con pacto de retro figura en el documento. La expresión "si yo pagare o mandare pagar" (dentro del plazo estipulado) * * * "esta hipoteca quedará cancelada y sin ningún efecto" es apropiada y típicamente de los contratos de hipoteca en los que el pago sencillamente anula el documento. En el contrato discutido no hay estipulación alguna de que Delima se haya reservado el derecho de recomprar las fincas ni promesa de parte de Boyles de retrovenderlas en su tiempo. Siendo el contrato de venta a retro bilateral, Boyles debió de haber firmado como cootorgante en la escritura. Del párrafo 3.°, se desprende que la intención de las partes era la de que el dinero entregado por Boyles ganaría algún rédito en forma de intereses; más, en lugar de éstos, se convino en que él percibiría los productos de las fincas gravadas cuya posesión se le entregó; o sea, como reza el mismo contrato, "en compensación

de no tener que pagarle al otorgante ningún interés por la cantidad recibida."

Por las expresiones y estipulaciones en el contrato, y otros detalles, que se acaban de mencionar, es nuestro parecer que la escritura en cuestión fué otorgada con el propósito de asegurar el pago de los ₱600. En ella, repetidas veces se ha denominado el convenio como "hipoteca". No existen en ella las palabras que ordinariamente se emplean en ventas a retro. El cobro de rédito, ya en forma de intereses o en frutos del terreno gravado, ciertamente riñe con el concepto de la venta con pacto de retro porque esta traspasa el título legal al comprador y lleva consigo el derecho a la posesión, a falta de un convenio en contrario.

Para sostener su contención de que el documento controvertido es de venta con pacto de retro, los apelantes se agarran a la 2.° claúsula en el párrafo 2 que dice: "de lo contrario se convertirá en venta definitiva por la suma de SIETECIENTOS CINCUENTA PESOS, (₱750), moneda filipina, debiendo por tanto el Sr. E. Boyles aumentar al vendedor la suma de ₱150." Argúyese que la expresión de "se convertirá en venta definitiva" solamente se emplea en una venta con pacto de retro. Esta contención de los apelantes es errónea.

Una venta con pacto de retro transmite el dominio o título legal al comprador. Durante la pendencia del derecho de retracto, el vendedor no tiene sobre la cosa vendida mas que el derecho de recuperarla, que se reservó, si cumple con los requisitos legales. Si el vendedor permite que el período de recompra transcurra sin que él ejerza su derecho de retracto, el comprador adquirirá el dominio de la cosa vendida y aquél perderá todos sus derechos sobre ella. Ahora bien, la clausula, arriba acotada, del contrato exhíbito A, está en contravención al citado concepto jurídico de la venta a retro. De conformidad con tal estipulación, aunque transcurran los cuatro años, y Delima no pague los ₱600, la venta (si lo fuera) no se convertiría, *ipso facto,* en absoluta o definitiva sino que habría necesidad de que Boyles pagase una suma adicional de ₱150. Mientras dicha suma no se pague no puede haber venta definitiva y Delima no pierde sus derechos sobre la cosa. Aún después de pagada dicha suma adicional, habría necesidad de otorgar el documento de venta correspondiente. De todo esto, se infiere que la claúsula mencionada es, a lo más, una promesa independiente y condicional de venta y no dá a la transacción principal, contenida en el Exhíbito A, el carácter o naturaleza que los apelantes tratan de atribuirla. Siendo unilateral dicha promesa de venta era necesario que el aceptante resolviese primero hacer la compra para que la venta se perfeccionase y consumase. Es más, la promesa de venta no transmite título o dominio sobre la propiedad y sólo concede el derecho de reclamar el cumplimiento de lo pactado.

Por lo demás, en el supuesto de que la aludida claúsula hubiese, de algún modo, creado ambiguedad en la terminología del contrato en cuestión o hubiese hecho dudosa la intención de las partes, con todo creemos que el juzgado inferior ha acertado en optar por el contrato de préstamo con garantía toda vez que este contiene condiciones menos onerosas o dá lugar a menor transmisión de derechos e intereses y, por el, el deudor no se desprende de su propiedad y sólo confiere al acreedor derecho de cobrar su crédito sobre el valor de la propiedad puesta en garantía. Tal pronunciamiento está ajustada a la constante jurisprudencia en esta jurisdicción.

Por tanto, aún sin discutir y tener en cuenta las pruebas *aliunde*, obrantes en autos, sobre la intención de los otorgantes del Exhíbito A, hallamos que el juzgado inferior no incurrió en error en su interpretación de dicho contrato.

Por las razones y conclusiones a que hemos llegado, expuestas en la precedente discusión del segundo señalamiento de error, somos de parecer que el tercer error, apuntado por los apelantes, carece asímismo de mérito. El contrato Exhíbito A, no siendo de venta con pacto de retro, no ha transmitido el dominio o el título sobre las propiedades en cuestión ni a Boyles ni a Emilio del Valle Sr., causante inmediato de los apelantes. La venta prometida no ha llegado a consumarse, pues no consta en autos que Boyles haya resuelto comprar las fincas. El precio de dicha venta prometida no consistía únicamente en el importe del préstamo si no en otra cantidad mayor, por lo que el presente caso no tiene paridad con el de Alcantara *vs.* Alinea, 8 Phil., 113–115, invocado por los apelantes. El derecho de Boyles, como aceptante de la promesa de venta, nunca fué transferida a Emilio del Valle Sr., como así se desprende del Exhíbito E, en que los apelantes tratan de basar sus pretendidos derechos dominicales. La pretención de los apelantes de que la suma adicional de ₱150 para completar el precio de ₱750 fué pagada por Emilio del Valle Sr. y la apelante Rosario del Valle a la esposa del apelado en el año 1932, no está acreditada. Es más, ello es harto increíble, puesto que el año 1932 la esposa del apelado ya no estaba en Bohol; y, como así acertadamente ha declarado el juzgado inferior, si dicho pago fuera cierto, resultaría que el mismo se hizo aún antes de transcurrir los cuatro años—contados desde el 24 de abril de 1929—dentro de los cuales el apelado tenía derecho de redimir las propiedades, pues la obligación de pagar dichos ₱150 nació tan sólo despues de expirados los citados cuatro años en 24 de abril de 1933. En dicho supuesto caso, resultaría que el pago se hizo aún antes de conocerse si el apelado podía saldar o no su deuda.

La pretendida prescripción adquisitiva, sobre ser materia extraña en un juicio declaratorio, carece de base legal. Cuando un acreedor hipotecario adquiere posesión, con con-

sentimiento del deudor, como en el caso que nos ocupa, los derechos de las partes se determinan con arreglo a los principios aplicables al contrato de anticresis (Macapinlac *contra* Gutierrez Repide, 43 Jur. Fil., 808). Los contratos de préstamo con garantía, en virtud de los cuales un deudor cede a su acreedor su propiedad raiz para que éste la usufructue mientras no se salde la deuda, destinándose sus frutos al pago de los intereses, caen bajo las disposiciones de los artículos 1881 a 1886 del Código Civil, que tratan del contrato anticrético, puesto que tienen las mismas caracteristicas jurídicas del contrato de anticresis (Santa Rosa *vs.* Nable, 36 Off. Gaz., 2724). El acreedor en tales casos no podrá mediante prescripción adquirir el dominio del inmueble recibido como garantía; y la razón es porque entró en posesión del mismo no a título de dueño sino de acreedor con derecho sólo a cobrar su crédito, o sus intereses, de los frutos del inmueble puesto en garantía (Barretto *contra* Barretto, 37 Jur. Fil., 246–7).

Hallamos acertada la interpretación dada por el juzgado inferior al Exhíbito E. De sus propios términos se desprende claramente que lo que se había cedido por Boyles, en su virtud, era un crédito garantizado por las dos parcelas de terreno y no éstas mismas o el dominio sobre ellas. De ahí que el documento reza que cedía "la hipoteca de los terrenos"; quedaba autorizado Del Valle "a usufructuar los productos de los terrenos" y "que los gastos por alambrar el terreno y por plantar cocos deberán ser apuntados" para ser reembolsados a él "al tiempo del rescate." Los apelantes no adquirieron mas derechos que los de su causante, como tal cesionario, en virtud del citado Exhíbito E.

No creemos que sea necesario discutir extensamente el quinto error señalado toda vez que la cuestión de sí es válida o no la opción de compra, contenida en el párrafo 4.0 del contrato, Exhíbito A, viene a ser secundaria a la principal, que atañe a la interpretación de todo dicho documento. La falta de consideración y de prueba en autos de que tal derecho de opción haya sido cedido a Emilio del Valle Sr. es, sin embargo, evidente.

En resumen, este Tribunal no halla al juzgado inferior incurso en ninguno de los errores señalados; y, por tanto, confirma la decisión recurrida, con las costas a cargo de los apelantes.

Reyes y *Borromeo, MM., están conformes.*

Se confirma la sentencia.

[No. 2318–R. July 15, 1949]

PEDRO ERAÑA ET AL., plaintiffs and appellants, *vs.* CONCEPCION ALMASAN ET AL., defendants and appellees

1. PLEADING AND PRACTICE; APPEAL; QUESTIONS THAT MAY BE RAISED ON APPEAL.—The question as to whether a contract is one of antichresis or sale with *pacto de retro* is akin to the question

as to whether it is one of mortgage, as both issues must be determined by the interpretation of the same document. Consequently, it cannot be considered that the question as to whether it is a mortgage is outside of the pleadings, in view of the fact that a copy of the contract was attached to the complaint as an integral part. It would be otherwise if the pleadings and the evidence presented did not themselves present the question as to whether the contract involved is one of mortgage. Furthermore, the pleadings may be amended at any time even after judgment in order to conform to the evidence presented without objection of the party concerned, and the trial or the appellate court may consider it so amended. In the present case, it is not even necessary to amend the pleadings as the contract in question, which gives rise to various interpretations, is a part of the complaint. (Limpangco Sons *vs.* Yangco Steamship Co. 34 Phil., 597, 599.)

2. ID.; RELIEF; ALTERNATIVE RELIEF.—Even though the plaintiff has not demanded the relief that the contract be declared a mortgage, yet the body of the complaint which includes the contract in question, may entitle the plaintiff to the alternative relief that the contract be declared one of mortgage if its terms may be so interpreted. What constitutes the complaint are the allegations in the body thereof and not the prayer.

3. CONTRACTS; ANTICHRESIS.—According to article 1881 of the Civil Code, in antichresis it is the obligation of the creditor to apply the products to the payment of the interest and the capital. As in the contract in question this obligation is not imposed on the creditor or his heirs or assigns, the contract is not one of antichresis.

APPEAL from a judgment of the Court of First Instance of Laguna. Yatco, J.

The facts are stated in the opinion of the court.

Juan A. Baes for appellants.

Alfonso Farcon for appellees.

JUGO, *J.*:

On August 18, 1928, the spouses Pedro Eraña and Aurea Arambulo on the one hand, and Agapito Almasan on the other, executed the document, marked as Exhibit A, which is quoted below in full in view of the fact that the decision of this case depends on its interpretation:

"TANTUIN NG LAHAT SA PAMAMAGUITAN NITO

"Kaming, Pedro Eraña at Aurea Arambulo, magasawa, kapua tubo at ang tanggapan ng sulat ay Santa Rosa, Laguna, K. P., at Agapito Almasan, balo, naninirahan at ang tanggapan ng sulat ay Biñang, Laguna, sa pamamagitan ng kasulatang ito ay boong laya at walang pagbabalik loob na inilalagda at pinagtitibay ang mga sumusunod:

"Na ang nasabing magasawang, Pedro Eraña at Aurea Arambulo, ay may tinatangkilik na isang lagay na tubigan kilala sa Lote blg. 2164 ayon sa plano sa Hacienda ng Santa Rosa, Laguna. Ang kanilang pananangkilik at pagmamayarí ay susog at kaloob ng batas blg. 1120.

"Na alang-alang sa halagang dalawang libong piso (P2,000) salaping pilipino ibinayad at tinanggap ng boong kasiyahang loob ng nasabing magasawa, sa pamamagitan ng kasulatang itó ay inililiwat, isinasalin at ipinagbibili, at ngayon ngá ay inililiwat, isinasalin at ipinagbibili, kay Agapito Almasan ng magasawang Pedro Eraña at

Aurea Arambulo, ang kanilang karapatan, katibayan at interes sa nasasabing lagay na tubigan; nguni't walang ibang kahulugan ang pagkakalipatan sa kagawaran ng mga lupaing bayan kundi isinasagot lamang sa pagbabayad ng pagkakautang ng magasawang Pedro Eraña at Aurea Arambulo natatakda sa unahan nito, at pagbabayad ng nasabing magasawa ng kanilang pagkakautang na nasasabi sa unahan nitó, ay tungkulin ni Agapito Almasan na ibalik at ipasulat na mulí sa pangalan ng magasawa, subali't samantalang hindi nakakabayad ang naulit na magasawa ay hindi nilá maiuutang sa iba.

"Na bagama't ang nasabing lupang tubigan ay napasalin sa pangalan ni Agapito Almasan, ang magasawa ang siyang, magpapatuloy ng pagbabayad ng jornal at amillaramiento, at ang Agapito Almasan namán ang siyang magbabayad ng contribución sa tubig.

"Na simulá sa araw na lagdaan ang kasulatang itó, si G. Agapito Almasan ang siyang magpapagawa, magtatangkilik at makikinabang ng lahat ng aanihin sa nasabing lagay na tubigan hanggang sa panahong mabili ulí ang naulit na lupá ng nasabing magasawa, ng mga magmamana sa kanila at magkakaroon ng karapatan.

"Na ang naulit na magasawa ay binibiguian ng karapatan ng nasabing Agapito Almasan, ng ang magmamana sa kaniya at magkakaroon ng karapatan, na mabili uli ang naturang lupá sa ikasiyam (9) ikasampu (10) taon simula sa araw na lagdaan ang kasulatang itó. Ang kahulugan nito ay itó: Na hindi mabibili ng naturang magasawa ang lupang nasasabi sa dakong unahan nito kundi sumapit ang ikasiyam o ikasampung taon simula sa panahong lagdaan ang documentong itó. Kung dumating ang naulit na siyam o sampung taon at ang bukid na binabanguit sa unahan nito ay may tanim o nasimulan na ng pagpapagawa, ang karapatang binabangguit sa dakong unahan nitó ay magagamit lamang matapos maipaani o makapagpaani ang nasabing Agapito Almasan.

"Na kung sakali't dumating ang nasabing ikasiyam o ikasampung taon at ang nasabing magasawa o magmamana sa kanila at magkakaroon ng karapatan ay walang sapat na ikabili sa nasabing bukid, si G. Agapito Almasan ay nagkakaloób ng paluguit pang limang taon at magpapagawa uli ng panibagong kasulatan."

After the death of Agapito Almasan, his heirs made a partition of his estate in which Lot No. 2164, here in question, was adjudicated to his heir Concepcion Almasan, defendant herein.

On October 2, 1942, the plaintiffs Pedro Eraña and Aurea Arambulo filed a complaint in the Court of First Instance of Laguna against Concepcion Almasan and Cornelio Jaurigue, who was included as her husband, praying that the defendants be required to render an accounting of the products of Lot No. 2164 and to reconvey it to the plaintiffs.

The defendants answered that said lot had been sold to them for ₱2,000 with the right to repurchase and that the ten years' period provided for the repurchase had expired without the plaintiffs' having exercised said right and that, therefore, the lot had become the absolute property of the defendants.

The plaintiff Pedro Eraña died on January 2, 1945 and, upon motion, he was ordered substituted by his heirs Justiniano, Magno, Francisco, and Felicidad, all surnamed Eraña.

After trial, the court rendered judgment as follows:

"In view of the foregoing considerations, the Court hereby dismisses the complaint filed by the plaintiffs; and, declares Concepcion Almasan, married to Cornelio Jaurigue, the exclusive owner of Lot 2164 of the Sta. Rosa Estate Subdivision under Transfer Certificate of Title No. 16982 of the Register of Deeds of Laguna, without pronouncement as to costs."

From the above judgment the plaintiffs appealed, making the following assignment of errors:

"I

"The trial court erred in not holding that the deed in question was one of mortgage for ₱2,000.

"II

"The trial court also erred in holding that the deed in question (Exh. A) is one of sale with right of repurchase.

"III

"The trial court further erred in not holding that, granting for the sake of argument that the deed is one of sale with right of repurchase, the period to repurchase the property in question has not yet expired on October 2, 1942, the date of the commencement of this suit."

The question at issue is whether the contract above quoted is one of antichresis, a sale with *pacto de retro,* or a mortgage.

The appellees contend that inasmuch as the question raised in the court below was whether the contract was antichresis or sale with *pacto de retro,* the appellants cannot now raise the question of whether it was one of mortgage citing in their support, Sec. 19 of Rule 48, which reads as follows:

"SEC. 19. *Questions that may be raised on appeal.*—Whether or not the appellant has filed a motion for new trial in the court below, he may include in his assignment of errors any question of law or of fact that has been raised in the court below and which is within the issues made by the parties in their pleadings."

It will be noted, however, that the question as to whether a contract is one of antichresis or sale with *pacto de retro* is akin to the question as to whether it is one of mortgage, as both issues must be determined by the interpretation of the same document. Consequently, it cannot be considered that the question as to whether it is a mortgage is outside of the pleadings, in view of the fact that a copy of the contract was attached to the complaint as an integral part. It would be otherwise if the pleadings and the evidence presented did not themselves present the question as to whether the contract involved is one of mortgage. Furthermore, the pleadings may be amended at any time even after judgment in order to conform to the evidence presented without objection of the party concerned, and the trial or the appellate court may consider it so amended. In

the present case, it is not even necessary to amend the pleadings as the contract Exhibit A, which gives rise to various interpretations, is a part of the complaint. The Supreme Court, in the case of Limpangco Sons *vs.* Yangco Steamship Co. (34 Phil., 597, 599) said:

"3. ID.; ID.; ID.; CHANGE OF THEORY.—Where, however, the theory of the case as set out in the pleadings remains the theory throughout the progress of the cause, the change of emphasis from one phase of the case as presented by one set of facts to another phase made prominent by another set of facts, all of which facts were received in evidence without objection as clearly pertinent to the issues framed by the parties in their pleadings, does not result in a change of theory, and particularly not where the two sets of facts are so closely related both as to time and by nature that they are to all intents and purposes inseparable."

The above ruling is strengthened by Sec. 9, Rule 35, which says:

"SEC. 9. *Extent of relief to be awarded.*—A judgment entered by default shall not exceed the amount or be different in kind from that prayed for in the demand for judgment. In other cases the judgment shall grant relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Even though the plaintiff has not demanded the relief that the contract be declared a mortgage, yet the body of the complaint which includes the contract in question, may entitle the plaintiff to the alternative relief that the contract be declared one of mortgage if its terms may be so interpreted. What constitutes the complaint are the allegations in the body thereof and not the prayer.

"*Plaintiff entitled to relief to which facts entitle it.*—A plaintiff is entitled to the relief to which the stated facts entitle it even though its own theory of relief may have been unsound. In an action against the Collector of Customs alleging wrongful refusal to release certain publications, the court erred in summarily awarding judgment for defendant, even though plaintiff's request for mandamus as a remedy was improper, where plaintiff had made its allegations full and complete and had also asked for 'other and further relief,' since plaintiff might have had a right to damages.

"*Granting of any relief to which party is entitled.*—If the complaint states a claim upon which any relief can be given, it is immaterial what the plaintiff has asked for in his prayer or whether he has asked for the proper relief; the court will grant him the relief to which he is entitled under the facts as proven. Consequently a complaint seeking equitable relief will not be dismissed on the ground that plaintiff has an adequate remedy at law if it states a claim upon which any relief, legal or equitable, can be given.

"Coercive relief may be granted in an action for declaratory judgment if the facts show that plaintiff is entitled to such relief." (Moran's Comments on the Rules of Court, Vol. I, p. 575, Second Edition.)

Is the contract an antichresis? Article 1881 of the Civil Code says:

"ART. 1881. By antichresis the creditor acquires the right to receive the fruits of real property belonging to his debtor, subject to the

obligation of applying them to the payment of the interest, if any, and afterwards to the principal of his credit."

According to said article, in anticresis it is the obligation of the creditor to apply the products to the payment of the interest and the capital. As in the contract Exhibit A, this obligation is not imposed on the creditor Agapito Almasan or his heirs or assigns, the contract is not one of antichresis.

Is it a contract of sale with *pacto de retro?* In Exhibit A, the following phrases are found:

"* * * nguni't walang ibang kahulugan ang pagkakalipatan sa kagawaran ng mga lupaing bayan kundi isinasagot lamang sa *pagbabayad* ng *pagkakautang* ng magasawang Pedro Eraña at Aurea Arambulo natatakda sa unahan nito, at *pagbabayad* ng nasabing magasawa sa kanilang *pagkakautang* na nasabi sa unahan nitó, ay tungkulin ni Agapito Almasan na ibalik at ipasulat na mulí sa pangalan ng magasawa, subali't samantalang hindi *nakakabayad* ang naulit na magasawa ay hindi nilá maiuutang sa iba." (Italics ours.)

It is clear that the conveyance was made to guarantee the payment of a debt. If it was a sale why was the phrase "payment of a debt" used in it? The contract says "pagbabayad ng pagkakautang" and "pagbabayad ng nasabing magasawa ng kanilang pagkakautang." It is very hard to conceive of payment of a debt as a sale. It is so clear that the document deals with the payment of a debt that all that is necessary to determine its nature is merely to read it, all attempts at interpretation being superfluous. In the case of Perez *vs.* Cortes (15 Phil., 211), the Supreme Court held as follows:

"2. CONSTRUCTION OF CONTRACTS.—In the event of a doubt as to the nature and conditions of a contract that can not be decided by the language of the document setting forth such agreement, it should be held that the debtor assumed the lesser obligation and that the liability contracted is that which permits the greatest reciprocity of interests and rights. (Art. 1289, Civil Code.)"

In the present case, there can hardly be any doubt from the language of the contract that it is a mortgage to guarantee the payment of a debt.

In Macapinlac *vs.* Gutierrez Repide (43 Phil., 770, 771), the Supreme Court had the following to say:

"4. MORTGAGE; CONVEYANCE OF LAND AS SECURITY FOR DEBT.—Doctrine of Cuyugan *vs.* Santos (34 Phil., 100) followed, to the effect that where a contract of sale with *pacto de retro* is executed as security for a debt owing from the grantor to the grantee, such conveyance must be treated in equity substantially as a mortgage, that is, as creating a mere equitable charge in favor of the creditor or person named as purchaser therein; and the fact that the conveyance was executed for this purpose may be shown by oral evidence apart from the instrument of conveyance.

"5. ID.; ID.; FORM OF ENGAGEMENT IMMATERIAL.—The equitable doctrine that any conveyance intended as security for a debt will be held in effect to be a mortgage, whether actually so expressed in the instrument or not, operates regardless of the form of the

agreement chosen by the contracting parties as repository of their obligations. Equity looks through the form and considers the substance; and no kind of engagement can be devised which will enable the purchaser to evade the effects of the doctrine to which reference is made."

From what has been said above it results that the contract is not a sale with *pacto de retro*. But even if it were a *pacto de retro* sale, it provides as follows:

"Na kung sakali't dumating ang nasabing ikasiyam o ikasampung taon at ang nasabing magasawa o magmamana sa kanila at magkakaroon ng karapatan ay walang sapat na ikabili sa nasabing bukid, si G. Agapito Almasan ay magkakaloob ng paluguit pang limang taon at magpapagawa uli ng panibagong kasulatan."

Agapito Almasan is willing to give an extension of five years. In order to validate this extension so as to take it out of the ten-year period fixed by law, another document would be executed. The execution of the new document would have been a mere formality, which would necessarily have been executed by the parties. In equity, what should be done is considered done. The time to repurchase from August 18, 1928, date of Exhibit A, had not expired when the complaint was filed in this case on October 2, 1942. This question is, however, academic in view of the conclusion above set forth as to the nature of the contract.

In view of the foregoing, with the reversal of the judgment appealed from, the document Exhibit A is declared a contract of mortgage; the land mentioned in said document is declared the property of the plaintiffs and the Register of Deeds of Laguna is ordered to cancel the Transfer Certificate of Title issued in the name of Concepcion Almasan and in lieu thereof to issue a new one in the name of the plaintiffs, subject to the mortgage in the sum of ₱2,000 in favor of the defendants; and the plaintiffs are ordered to pay to the defendants the sum of ₱2,000 within ninety days after this decision has become final, and should the plaintiffs fail to do so, said property shall be ordered sold in the manner prescribed by Rule 70 of the Rules of Court to realize said amount, with costs against the appellees. It is so ordered.

De la Rosa and *Rodas, JJ.*, concur.

Judgment reversed.

[No. 2435-R. July 15, 1949]

FAUSTA TAPAYAN, plaintiff and appellee, *vs.* TRINIDAD TAGAYTAY and PABLO CAPANGPANGAN, defendants and appellants.

1. EVIDENCE; WEDDING GIFTS; PROOF OF WEDDING GIFTS NEED NOT BE IN WRITING.—The attorney for the plaintiff objected to the presentation of oral evidence relative to wedding gifts of the jewelries in question to the defendants, alleging that under the

statute of frauds such transaction can only be proved by writing. This contention is not well taken. Under article 1044 in connection with article 632 both of the Civil Code, wedding presents of movable property may be made verbally.

2. COURTS; APPEAL; WHEN FINDINGS OF TRIAL COURTS SHOULD BE SUSTAINED ON APPEAL.—When two judges at two different trials, after carefully observing the parties and their witnesses testify before them, have reached a similar finding as to the weight that should be accorded their testimonies and where, as in this case, there is nothing in the record which demonstrates that the evidence thus accepted by them as true is unreasonable or is false or suffers from any other legal defects—there is not only a persuasive but also a compelling reason for the appellate court to sustain such finding.

APPEAL from a judgment of the Court of First Instance of Cebu. Moscoso, J.

The facts are stated in the opinion of the court.

Florencio S. Urot for appellant.
Eriberto Seno for appellee.

DE LEON, *J.:*

This is an appeal taken by defendants against the following decision of the Court of First Instance of Cebu:

"Fausta Tapayan sues her daughter Trinidad Tagaytay and her husband Pablo Capangpangan, for the return of a gold necklace with a medal worth ₱125, and one gold necklace with medal worth ₱50, one pair of gold earrings valued at ₱10, one comb with gold valued at ₱10, and cash in the amount of ₱64. The plaintiff asserts that these articles are her own properties while the defendants claim that they are the properties of the defendants Trinidad Tagaytay because she has bought one of the gold necklaces and the other jewelries were given to her as prenuptial gifts by her parents.

"The evidence for the plaintiff established the facts that the gold necklace and the medal worth ₱125 was bought by her from one Lope Tapayan in 1928. The other gold necklace with a medal in the form of a heart worth ₱50 was bought by her from Daniel Andang or Daniel Mercado while the gold earrings and the comb were purchased from Didang before she left for Misamis Oriental in 1935. She had been using these jewelries on fiestas and other special occasions as evidenced by the group pictures [Exhibits A, B and C] wherein she appears wearing them. (Exhibits A–1, B–1 and C–1.) She kept these jewelries and ₱64 cash in a tin can while she was living in the house of the defendants from March to August, 1946. Plaintiff became very ill in August, 1946 and when she recovered she found that the jewelries mentioned and the money were missing. She asked her daughter, the defendant Trinidad Tagaytay, if she took them, but the latter denied having taken them. Thereafter, the plaintiff transferred

to the house of her other daughter by the name of Olimpia Tagaytay and because of the continued refusal of the defendant to return the jewelries and the money, the plaintiff complained to the police station at Talamban, Cebu City, Sergeant Tariman who was in charge of that station sent for the defendants who appeared before him on November 16, 1946. Defendant Trinidad Tagaytay admitted to him having her possession the jewelries in question and the amount of ₱44 only. There were present on that occasion the plaintiff, the defendants, plaintiff's daughter Olimpia Tagaytay with her two daughters, and one Maximo Codiniera. Sergeant Tariman advised the defendants to return the jewelries and the money, and they promised to come back the next day to bring the jewelries and the money with them, but on the following day only defendant Pablo Capangpangan returned to the police station at Talamban, informing Sergeant Tariman that the defendant Trinidad Tagaytay was sick and bringing with him a letter of Attorney Urot addressed to Sergeant Tariman advising him not to take cognizance of the matter because it was a civil case between the parties. Thereupon, the sergeant advised the plaintiff to go to the fiscal. The fiscal also refused to file a criminal charge against the defendants by reason of their relationship with the plaintiff.

"The defense presented evidence showing that the jewelries in question were given to the defendant Trinidad Tagaytay by her mother when she married her co-defendant and husband Pablo Capangpangan, while the other necklace with the gold medal in the shape of a heart was bought by her from said Daniel Mercado or Daniel Andang for ₱15 and 500 ears of corn worth ₱10, or a total of ₱25. The defendants presented Exhibit 2 (a group picture, taken during a fiesta in January, the same month of her wedding, showing defendant Trinidad Tagaytay Exhibit 2–a) wearing one of the necklaces and earrings (Exhibits 2–b and 2–c). Pantaleon Tapayan a brother of the plaintiff, confirmed the fact that the jewelries in question with the exception of one necklace with a medal in the shape of a heart was given to Trinidad Tagaytay as a wedding gift from her parents. Witness Gregorio Herbieto also confirmed the fact that he was present when the defendant Trinidad Tagaytay bought the necklace with a heart medal from the deceased Daniel Andang or Daniel Mercado. The attorney for the plaintiff objected to the presentation of oral evidence relative to wedding gifts of the jewelries in question to the defendants Trinidad Tagaytay, alleging that under the statute of frauds such transaction can only be proved by writing. This contention is not well taken. Article 1044 in connection with article 632

both of the Civil Code, permits wedding presents of movable property without any writing.

"To these proofs by the defense the plaintiff, on rebuttal proved that the jewelries worn by the defendant Trinidad Tagaytay in the picture Exhibit 2 are not the same ones involved in this litigation. Sergeant Tariman of the police station of Talamban, Cebu City again testified in rebuttal with the confirmation of Maximo Codiniera, that defendant Trinidad Tagaytay admitted to him in the presence of her co-defendant's husband, the plaintiff, the latter's other daughter Olimpia Tagaytay and her two daughters, and said Maximo Codiniera, that she had these jewelries in her possession together with ₱44 in cash and that she promised to return them the following day of their conference on November 16, 1946, but she failed to comply with her promise. Other rebuttal evidence disclosed that Pantaleon Tapayan, who testified for the defendant, had certain grudges against the deceased husband of the plaintiff to such an extent that, contrary to his testimony, he was not present during the wedding of defendant Trinidad Tagaytay. The evidence further shows that witness Herbieto had previously informed Sergeant Tariman that he (Herbieto) had been asked by the defendants to prepare a document of sale of the jewelries in question in favor of the defendant Trinidad, to be signed by the plaintiff which was not actually accomplished, a fact which evidences the partiality of the said witness who is a compadre of the defendants.

"After a careful consideration of the evidence presented by both sides, the Court is of the opinion that the preponderance of the same is conclusively in favor of the plaintiff. It is a significant fact that among the sisters of defendant Trinidad Tagaytay, she was the only one who claims to have been given by her parents wedding presents of jewelries which her other sisters did not have the opportunity to receive at all, there being no showing on the record that the defendant was considered with certain predilection by her parents.

"Wherefore, the Court adjudges this case in favor of the plaintiff declaring her as the owner of the jewelries in question and ordering the defendants to return the same to her together with the ₱64 in cash and with costs of both instances against them."

The three errors assigned by appellants raise substantially the same issue—the correctness of the above findings of facts by the lower court.

So far as appears from the evidence before us, the facts of the case are stated fully and fairly in the above-quoted decision and we find His Honor's findings fully supported. Besides, we think that there is a circunstance in the case

which compels us to uphold said finding. This case was tried before two different judges before whom the parties and their witnesses appeared and testified. The evidence adduced in support of the conflicting claims of ownership over the jewelries in question is oral. It was first tried before Municipal Judge Filomeno B. Ibañez of the City of Cebu who, after due hearing, found the preponderance of the evidence in favor of the plaintiff and rendered judgment accordingly. The case was elevated to the Court of First Instance of Cebu, where after a trial *de novo*, presiding Judge Moscoso found the preponderance of the evidence also in favor of the plaintiff and rendered the decision now subject of appeal. When two judges at two different trials, after carefully observing the parties and their wintnesses testify before them, have reached a similar finding as to the weight that should be accorded their testimonies and where, as in this case, there is nothing in the record which demonstrates that the evidence thus accepted by them as true is unreasonable or is false or suffers from any other legal defects—there is not only a persuasive but also a compelling reason for the appellate court to sustain such finding.

The judgment appealed from is hereby affirmed, with costs against the appellants.

Concepcion and *Dizon, JJ.*, concur.

Judgment affirmed.

[No. 1535–R. July 19, 1949]

ANICIA SANTOS, FAUSTINO SANTOS, and ENGRACIA LARA, plaintiffs and appellees, *vs.* MATIAS FERNANDO and Mrs. MATIAS FERNANDO, defendants and appellants.

1. SALE; REDEMPTION; TENDER OF PAYMENT; WRITTEN OFFER TO REPURCHASE EQUIVALENT TO TENDER OF PAYMENT.—If a portion of a community property is sold by some co-owners, and there is an offer by the remaining co-owners in writing to redeem it, there is no need for said remaining co-owners to make an actual tender of the money because the offer in writing is equivalent to said tender (section 24, Rule 123, Rules of Court).
2. ID.; ID.; PRICE OF THE SALE, NOT THE VALUE OF THE MONEY PAID, IS REQUIRED.—The contention that the consignment of ₱30,000 was insufficient for the reason that said amount is not equivalent of the amount paid for the property at the time of the purchase on July 15, 1944, is without any legal basis or foundation. The law requires, for the exercise of the right redemption, not the value of the money paid as purchase price, but the price of the sale. (Article 518, Civil Code.)
3. ID.; ID.; REPURCHASE; OFFER TO REPURCHASE PRESERVES THE RIGHT THERETO.—An offer to repurchase is sufficent to *preserve the right* thereto. (Villegas *vs.* Capistrano, 9 Phil., 416, 419.)
4. ID.; ID.; PREREQUISITE OF ACTUAL REDEMPTION; OBLIGATIONS OF BOTH PARTIES.—The return of the purchase price is expressly required by law as a prerequisite for redemption. (Art. 1518,

Civil Code; Lafont *vs.* Pascasio, 5 Phil., 391, 394–395.) When plaintiffs herein chose to exercise the said right, which the law confers upon them as co-owners (article 1522, Civil Code), it gave rise to reciprocal obligations—on the part of the plaintiffs, that of returning the purchase price, and on the part of the defendants, that of delivering the property and executing a deed of sale therefor, pursuant to Article 1445 of the Civil Code.

5. ID.; ID.; ID.; ID.; CONSIGNATION; REFUSAL TO ACCEPT PURCHASE PRICE, EFFECT OF.—As the redemptioners herein were obligors, with the obligation of paying the price of the repurchase, in order to obtain the reconveyance of the property, they are entitled to exercise the privilege of consignation specified in article 1176 of the Civil Code upon refusal of the vendees to accept the purchase price offered to them to effect the repurchase, with the effects that it produces in accordance with the express provisions of Article 1177 of the Civil Code. (Arzaga *vs.* Rumbaoa, CA—G.R. No. 92–R; Lopez *vs.* Cabrera, CA—G.R. No. 285–R; Matias *vs.* Nicolas, CA——G.R. No. 554–R; Guinto *vs.* Sahagun, CA–G.R. No. 481–R.)

6. ID.; ID.; ID.; ID.; ID.; ID.; LOSS OF MONEY CONSIGNED, WHO BEARS THE SAME.—On general principles of law and justice the vendees should bear the loss of the amount consigned. Since the vendees were, in law, bound to allow the repurchase of the property, because the offer to repurchase was made within the time provided by law for the redemption, the consequences of their refusal must be borne by them and by no other. When the redemptioners tendered payment of the amount of the purchase price in order to obtain the redemption of the property, and the vendees refused to accept the money tendered, there was either default or fault on their part (article 1100, Civil Code), for which they became liable for the damages caused by their refusal (article 1101, Civil Code), which in this case is the loss of the amount consigned. A rule which would make redemptioners responsible for the loss of the money which vendees unjustly refused to accept, and which said redemptioners therefore deposited in Court, would penalize the prompt and the vigilant and would place a premium on delay and bad faith. When the vendees refused to allow the repurchase or to receive the amount consigned to them in court for said repurchase, they gambled on their rights. The loss of the money consigned should, therefore, be borne by them.

APPEAL from a judgment of the Court of First Instance of Manila. Dinglasan, J.

The facts are stated in the opinion of the court.

Viola, Anzures & Abdon for appellants.
Clemeña, Tan Torres & Bernardo for appellees.

LABRADOR, *J.:*

On and before July 25, 1944, plaintiffs herein were the registered owners of an undivided 4/5 portion of lot No. 11, block No. 2703 of the Cadastral Survey of Manila, together with the improvements thereon. The owners of the other undivided 1/5 portion were Catalina Lico and Nena Lico. On July 25, 1944, Catalina Lico and Nena Lico sold their undivided share in the property to the defenadnt Matias A. Fernando for the sum of ₱30,000 in Japanese military

notes (Exhibit B). The deed of sale was presented by defendant's attorney on July 28, 1944, at the Office of the Register of Deeds of Manila and entered as No. 22131, Volume 9, of the books of said office (See Receipt, Exhibit 2). The sale, however, could not be annotated at the back of the certificate of title, as defendant's attorney could not secure it from plaintiffs before the presentation of this action, which took place on August 12, 1944 (See Complaint, Record on Appeal, pp. 1–5).

In their complaint plaintiffs allege that they learned of the sale on or about August 6th and immediately thereafter, personally and in writing, offered to repurchase the interest sold, and that the last formal offer was made on August 11, 1944, but that the defendant refused to accept or allow the repurchase without any reason whatsoever (Record on Appeal, pp. 1–5). Upon presentation of the complaint, plaintiffs deposited with the court the amount of ₱30,000 for the repurchase (Exhibit D). The defendants allege in their answer that plaintiffs had been informed of the sale before August 6th, that plaintiffs had been offered the land but had refused to pay ₱30,000 for it, and that they had agreed to the disposal of the property, even promising to deliver the title to defendant's representative on August 5th and later on August 7th; that even if the offer to repurchase was made on August 11th, the offer was not accompanied by tender of cash payment; that plaintiffs had previously been offered the property, but they refused the offer, and thereby waived their right to legal redemption and are now estopped from exercising the same; and that the plaintiffs have failed to exercise their right to legal redemption on time, etc. (Record on Appeal, pp. 5–11.) The trial court found after trial that plaintiffs learned of the sale only on August 5, 1944, and held that the mere presentation of the deed in the Office of the Register of Deeds in not the inscription from which the period of legal redemption may be counted, that on August 11, 1944, plaintiffs formally wrote defendants offering to make the repurchase, and that the right to legal redemption was exercised within the period of nine days, as the plaintiffs consigned the amount for the repurchase on August 12, 1944, or on the seventh day after knowledge of the sale. It also held that as defendants refused to accept the price of the repurchase, plaintiffs were relieved of the obligation of paying the price. Consequently, it rendered judgment ordering defendants to execute a deed of reconveyance of the property purchased (Record on Appeal, pp. 12–20). The defendants have appealed against the above judgment, after their motion for new trial was denied.

The first two assignments of error of defendants-appellants' brief refer to the holding of the trial court that plain-

tiffs exercised their right of redemption within the period fixed by law, the third to its finding that plaintiffs had money ready to make the repurchase on August 6, 1944, and the fourth to its ruling that plaintiffs are relieved from paying the value of the purchase price as a condition for the reconveyance.

On the first question, counsel for appellants contend that the plaintiffs obtained knowledge of the sale for the first time on July 28, 1944, when their attorney called at their residence to inform them that his client had bought the property, for the second time when said attorney went back to plaintiffs' house because the title was not then in their possession, and for the third time on August 5, when said attorney sought the intervention of plaintiffs' friend and attorney, Engracio Clemeña. While it is true that Attorney Viola testified to that effect, his testimony is not in any way or manner corroborated. Then it is denied by plaintiff Faustino Santos, who declared that he came to learn of the sale only when he received Attorney Clemeña's note, which bears date of August 5, 1944. Finally, said testimony is positively refuted by the note of Attorney Clemeña itself, which contains the following significant statement: "el motivo el ya lo explicara a usted." (Exhibits E and E–1.) If Attorney Viola was to explain to plaintiff Faustino Santos why the title was needed in the Office of the Register of Deeds, it is because Attorney Viola had not had any opportunity to do so to him before, which goes to show that the supposed meeting between Attorney Viola and Faustino Santos, first on July 26th and later before August 5th, never occurred. But a still more conclusive part of the letter is its introductory statement, which reads: "El abogado Viola desea entrevistarse con usted * * *." This introduction clearly implies that Attorney Viola had not had the chance to speak to plaintiff Faustino Santos before that occasion, which also conclusively proves the falsity of Attorney Viola's testimony. In this respect, Attorney Clemeña testified that he accidentally met Attorney Viola in the court house, and as the latter knew Santos was his (Attorney Clemeña's) friend, he (Viola) asked him for a short note for Santos—which circumstance is contrary to Attorney Viola's testimony that the letter was prepared in Attorney Clemeña's office. Without further discussion, we declare that the trial court's finding that plaintiffs learned of the sale only on August 5, 1944, is fully justified by the evidence.

As to the third error, it appearing that on August 11, 1944, plaintiffs offered, in writing, to make the repurchase (Exhibit F), which defendants rejected, there was no need for plaintiffs to make an actual tender of the money, because the offer in writing is equivalent to said tender (Section 24, Rule 123, Rules of Court).

With respect to the fourth assignment of error, i.e., that the consignment of ₱30,000 was insufficient for the reason that said amount is not the equivalent of the amount paid for the property at the time of the purchase on July 25, 1944, it is enough to state that the law requires, for the exercise of the right of redemption, not the value of the money paid as purchase price, but the price of the sale (Article 1518, Civil Code). The assignment of error is, therefore, without any legal basis or foundation.

A fifth assignment of error is also set forth in appellants' brief, but as it refers to the preponderance of the evidence, it is already passed upon in the consideration of the first and second assignments of error.

An important point not raised directly in appellants' brief refers to the ruling of the court below that as appellants refused to receive the account deposited in court by the plaintiffs-appellees, the latter are relieved of the obligation of paying for the price of repurchase or its equivalent. The ruling becomes important in view of the fact that consignation of the price was made on August 12, 1944, and since then the money deposited (Japanese military notes) has lost its value. The Members of this Division had been unable to reach a unanimous vote on the above question, hence the need of reference to a division of five. The reason adduced against the ruling of the trial court is the fact that the deposit of the repurchase price is not necessary in order to compel the purchaser to make the resale if he refuses to accept it (Villegas *vs.* Capistrano, 9 Phil., 416; Asturias Sugar Central *vs.* Pure Cane Molasses Co., 60 Phil., 255). It is argued that as the deposit or consignation of the repurchase price is optional, the loss must be borne by the depositor, the appellees in this case.

We believe that the argument above set forth unduly seeks to extend the principle laid down in the cases abovementioned beyond the scope of realm of their application. The principle, as we understand it to be, is that an offer to repurchase is sufficient *to preserve the right thereto.* Thus, in the case of Villegas *vs.* Capistrano, 9 Phil., 416, the Supreme Court said:

"* * * When the plaintiff, on the 13th of May, by his duly authorized agent, presented himself at the residence of the defendant and offered to deliver the money, he did all the law required him to do to preserve his rights to repurchase. The subsequent deposit of the amount with the clerk of court was simply additional security for the defendant, but was not a necessary act to be performed by the plaintiff." (P. 419.)

The court did not say that the deposit may not be made if the person seeking repurchase chooses to make the deposit or consignation. And nowhere has it been held that if he chooses to do so, he bears the loss of the price de-

posited even if his right to repurchase is finally recognized in the action.

The case at bar, however, is different from the case above-cited. The plaintiffs herein do not merely seek a judicial recognition of their right to make the legal redemption; they expressly and specifically demand the execution of the deed of conveyance in their favor and the acceptance of the amount consigned (Paragraphs (*a*) and (*b*) of prayer of complaint, Record on Appeal, pp. 4–5). The consignation is, therefore, a necessary requirement for the grant of the specific remedy prayed for in plaintiffs' complaint. The return of the purchase price is expressly required by law as a prerequisite for actual redemption, thus:

"Article 1518. The vendor can not exercise the right of redemption without returning to the vendee the price of the sale, and * * *. (Civil Code.)

"The general laws governing contracts of purchase and sale were undoubtedly intended to apply to an agreement of this character (a contract of *pacto de retro*). In a contract of purchase and sale the seller in not required to deliver the thing sold until the price is paid, in the absence of an agreement to the contrary (Art. 1466). Neither is the purchaser bound to pay the price before the article is delivered to him (Art. 1500), and we hold in this case that the payment of the price and the execution of the deed of resale were simultaneous acts, * * *. (Lafont *vs.* Pascasio, 5 Phil., 391, 394–395.)

When plaintiffs herein chose to exercise the right of redemption, which the law confers upon them as co-owners (Article 1522, Civil Code), said exercise of the right gave rise to reciprocal obligations on their part and on that of the purchaser—on the part of the plaintiffs, that of returning the purchase price, and on the part of the defendants, that of delivering the property and executing a deed of sale therefor, pursuant to Article 1445 of the Civil Code. There is, therefore, reciprocity between the obligations of one to the other.

Si nos fijamos, en primer lugar, en la índole de las obligaciones que del contrato de compra y venta se derivan y en la especial conexión que entre ellas existe, observaremos la nota de reciprocidad (que no es lo mismo que correlatividad) que es la caracteristica de los obligaciones bilaterales; * * *, veremos que entre las obligaciones principales de comprador y vendedor (entregar el precio y a cosa respectivamente), se da esa relación de reciprocidad, tan intima y sustancial, que no se comprende la entrega del precio sin la de la cosa, ni viceversa. Se debe pagar el precio porque nos deben dar la cosa comprada, y nos debe ser entregada esta porque hemos de satisfacer el precio. (10 Manresa, pp. 9–10.)

And if the plaintiffs herein were obligors, with the obligation of paying the price of the repurchase, in order to obtain the reconveyance of the property, they are entitled to exercise the privilege of consignation specified in Article 1176 of the Civil Code upon refusal of the defendants to accept the purchase price offered to them to effect the repurchase,

with the effects that it produces in accordance with the express provisions of Article 1177 of the Civil Code. This point has already been passed upon expressly by this court in the cases of Arzaga *vs.* Rumbaoa, CA–G. R. No. 92–R; Lopez *vs.* Cabrera, CA–G. R. No. 285–R; Matias *vs.* Nicolas, CA–G. R. No. 554–R; and Guinto *vs.* Sahagun, CA–G. R. No. 481–R. In the case of Lopez *vs.* Cabrera, *supra,* this court held:

> No estamos conformes con el pronunciamiento del Juzgado inferior de que no se puede obligar el comprador a retro que reciba como precio de la recompra el dinero consignado en el Juzgado por el vendedor a retro. Las razones dadas son las de que, según varias decisiones del Tribunal Supremo no es de absoluta necesidad la consignación en casos como el presente; y porque 'si cuando no tenía el demandante dinero, "fiat" o genuino, obtuvo del demandante que los rescatase después de la guerra pudiese obligar al demandado a recibir dicho dinero.' Estas razones no estan bien fundadas. Nada le impedía al vendedor a retro a hacer la consignación judicial una vez rechazada su oferta de pago. Con ella ha mostrado mayor diligencia para conservar sus derechos y mayor interes en recobrar su propiedad y también para hacer patente su buena fe. Además, si tenía perfecto derecho de recomprar la propiedad al tiempo de hacer la consignación, si esta era válida y eficas por ajustarse a las disposiciones legales que regulan el pago y si el comprador a retro se ha negado sin razón a aceptar el dinero consignado, no hay duda de que por el hecho de la consignación, no solamente ha quedado extinguida la obligación del vendedor a retro para con el comprador a retro sino que aquel tambien ha quedado libre de toda responsibilidad 'por los riesgos que después, y sin que procedad de actos suyos, sobrevengan a la cosa debida y consignada.' (Manresa, tomo 8, pág. 297.)

On general principles of law and justice also, we believe that the defendants should bear the loss of the amount consigned. Since the defendants were, in law, bound to allow the repurchase of the property, because the offer to repurchase was made within the time provided by law for the redemption, the consequences of their refusal must be borne by them and by no other. When plaintiffs tendered payment of the account of the purchase price in order to obtain the redemption of the property, and the defendants refused to accept the money tendered, there was either default or fault on their part (article 1100, Civil Code), for which reason they became liable for the damages caused by their refusal (article 1101, Civil Code), which in this case is the loss of the amount consigned. A rule which would make plaintiffs responsible for the loss of the money which defendants unjustly refused to accept, and which plaintiffs, therefore, deposited in court, would penalize the prompt and the vigilant and would place a premium on delay and bad faith. When defendants refused to allow the repurchase or to receive the amount consigned to them in court for said repurchase, they gambled on their rights. Having lost the case, they should be the ones to suffer the consequences of their refusal, for which they can blame no one but them-

selves. We, therefore, find no reason, in law or in justice or equity, for reversing the ruling of the court below relieving plaintiffs from the obligation of paying the repurchase price after the loss of the price which they had consigned in this action.

For all the foregoing considerations, we find that the judgment appealed from is in accordance with the law and the evidence, and we hereby affirm it, with costs against the defendants-appellants. So ordered.

Gutierrez David and *Paredes, JJ.*, concur.

BARRIOS, *M.; disidente y concurrente:*

Concurrimos en los hechos que constan en la decisión de la mayoría, pero disentimos de su opinión de que la pérdida del depósito o consignación hecha por los demandantes del importe de la finca comprada por los demandados, corre a riesgo de éstos. No siendo necesaria dicha consignación en casos de redención entre comuneros (Asturias Sugar Central *vs.* Pure Cane Molasses Co., 60 Phil., 255), no deben responder de su pérdida los aqui demandados Matias Fernando y esposa; puesto que dicha consignación no releva a los retrayentes Anicia Santos, et al., de la obligación de devolver el precio de la venta más los gastos del contrato y otros gastos relacionados con la compra de la finca (artículo 1518, Código Civil); pero nuestra Corte Suprema en su decisión de julio 27, 1949, dijo lo siguiente:

"For all the foregoing, the judgment of the Court of Appeals is affirmed with the only modification that the petitioner is sentenced to pay respondents, counting from May, 1944 until the property is delivered to respondents, as damages the amount of P35.55 yearly, plus costs. *If the price consigned in court was destroyed, petitioner must bear the loss.* (Soriano *vs.* Abalos et al., G. R. No. L–1525.)

Y acatando la anterior decisión de dicho Tribunal Supremo, retiramos nuestra disidencia.

DE LEON, *M.:*

Concurro con esta opinión disidente y concurrente.

Judgment affirmed.

[No. 2843.–R. July 19, 1949]

FIDEL C. QUERUBIN, protestant and appellee, *vs.* FELIPE S. MAMURI, protestee and appellant [1]

1. ELECTIONS; PROTESTS; BALLOT BOXES FOUND TAMPERED WITH; ELECTION RETURNS; RESULTS OF REVISION BY COMMISSIONERS; WHEN ELECTION RETURNS PREVAIL OVER RESULTS OF REVISION BY COMMISSIONERS.—It appearing that the contents of the ballot boxes for the precincts in question had thus been tampered

[1] *See* Resolution of the Supreme Court in G. R. No. L–3726 dated April 25, 1950. Petition for certiorari is dismissed, there being no question of jurisdiction involved.

with, thereby impeaching the integrity of said ballot boxes (Valenzuela *vs.* Carlos, 42 Phil., 453), and that the election returns were signed by the chairman and members of the respective boards of inspectors and are corroborated by the tally sheets, made coetaneously with the canvass by said boards; that no protest was made by any watcher—or by any other person—against irregularities in the reading of the ballots by the chairmen of said boards, who were appointed upon the protestant-appellee's recommendation; and that said election returns and tally sheets are borne out by the minutes of the respective boards, none of which has been assailed by any of the parties in the proceedings, who introduced said documents in evidence, said election returns must be considered as, and are, the best evidence of the true result of the elections in said precincts, and the contents of said returns should prevail over the result of the revision made by the commissioners appointed by the court in connection with the election protest.

2. ID.; ID.; PLEADING AND PRACTICE; EVIDENCE; COURT SHOULD FAVOR INTRODUCTION OF EVIDENCE ON CONTROVERSIAL QUESTIONS.—As a matter of practice, it is more advisable, in controversial questions, to err in favor of, than against, an opportunity to introduce evidence thereon, because of the considerable delay which would result, if a higher court should believe that the resolution should have been otherwise and, as a consequence, a new trial held.

APPEAL from a judgment of the Court of First Instance of Isabela. Arranz, J.

The facts are stated in the opinion of the court.

Domingo L. Vergara for appellant.
Gregorio P. Formoso for appellee.

CONCEPCION, *J.:*

Protestant-appellee, Fidel C. Querubin, and protestee-appellant, Felipe S. Mamuri, were the leading condidates for the office of mayor of the municipality of Ilagan, Province of Isabela, in the general elections held on November 11, 1947. Four days later, the municipal board of canvassers proclaimed Felipe S. Mamuri as the mayor elect, with a total of 685 votes, or a plurality of 9 votes over his closest opponent, Fidel C. Querubin, who received 676 votes (Exhibits A, N, 554 and 555). In due time (November 27, 1947) Querubin filed, with the Court of First Instance of Isabela, his election protest, questioning the result of the elections in several precincts (Nos. 7, 8, 10, 11, 12, 14, 15, 18 and 20). Mamuri answered on December 27, 1947, with a counter-protest in which he questioned the result of the election in other precincts (Nos. 2, 16, 17 and 21). On March 11, 1948, Mamuri filed an amended answer—alleging, among other things, that the ballot boxes for precincts Nos. 2 and 18 had been tampered with—which was admitted by the court, on the authority of the decisions of the Supreme Court in the cases of Valenzuela *vs.* Cortes (42 Phil., 428), Mandact *vs.* Samonte (49 Phil.,

284) and Yalung *vs.* Atienza (52 Phil., 871), over the protestant's objection. The ballot boxes of the protested, as well as those of the counter-protested, precincts were subsequently examined by commissioners appointed by the court, and, after the submission of their reports and due hearing, the latter rendered judgment, the dispositive part of which reads:

"In view of the foregoing revision and recounting of ballots, the court hereby declares that, in the general election of November 11, 1947, protestant Fidel C. Querubin was duly elected to the office of Mayor, municipality of Ilagan, Isabela, having received six hundred sixty-seven (667) votes as against six hundred sixty-three (663) votes received by protestee Felipe S. Mamuri, giving the former a plurality of four (4) votes. Costs and expenses incident to this protest are hereby taxed against the protestee."

The protestee appealed from this decision, and he now contends, in his brief, that:

1. "The lower court erred in not holding that ballot boxes for precincts Nos. 2 and 18 have both been tampered with and the contents thereof disturbed."

2. "Granting, tho without admitting, that ballot boxes for precincts Nos. 2 and 18 have not been tampered with and the contents thereof disturbed, according to the lower court's decision, 'for insufficiency of evidence presented', the court A Quo again erred in holding that 'the result of the examination and judicial counting of the votes of the parties in these two precincts should prevail over the election returns,"

3. "The lower court also erred, abusing its discretion, in denying the appellant his request to recall witness Roque Pescoso to the witness stand after having testified."

4. "The lower court likewise erred in denying the appellant the opportunity to present the twenty-four (24) registered electors of precinct No. 2, who voted for the appellant in said precinct and who all have signified their willingness to waive the secrecy of their ballots, offered for the purpose of upholding and strengthening the correctness and integrity of the election return therein prepared and submitted, Exhibit 'F', challenged by the ballots found."

5. "The lower court also erred in holding Exhibits C–2, I–4 and I–16, all marked ballots, simply because on the face of the same the word 'nacionalista' or 'nacionalista party' appears written."

6. "The lower court equally erred in holding Exhibits G–5, G–6, G–7, 294 and 110, all marked ballots, simply because at the bottom thereof, in each and every one of them, in the space for councilors were last written the words 'Te pok Na', 'Tepot NA, Tepokna', 'Tepoc' and 'Te pos', thereby concluding that the said words were written therein maliciously for the purpose of marking the ballot."

7. "The lower court also erred in holding Exhibit I–3, wherein 'Talattad' was written on all the eight lines for councilors, a marked ballot, notwithstanding the fact that said 'Talattad' was a duly registered candidate for councilor."

8. "The lower court equally erred in holding Exhibit I–9 a marked ballot, simply because the voter who prepared the said ballot wrote the words 'ni lacay' on space eight for councilors."

9. "The court A Quo also committed an error in not holding Exhibit I–13 and 466, wherein in the space for mayor are legibly

and fairly written 'F. Mano' and 'Mernada', good ballots and, therefore, giving the appellant valid votes therein under the doctrine and philosophy of idem sonans."

10. "The lower court again committed an error in not holding that Exhibits C and 530 gave good and valid votes in favor of the appellant herein, notwithstanding the misplacement, the said misplacement being general and the intention of the voter to vote for him being sufficiently clear."

11. "The lower court once more erred in not holding that Exhibit 467 gave a good and valid vote in favor of the appellant, when the 'illiterate' voter who prepared the said ballot wrote the name of 'F. Mamori', though on the first line for members of the provincial board, but preceded by the word 'mayor', thereby indisputably showing his intention to vote for the appellant for the office of mayor of Ilagan, Isabela."

12. "The court A Quo again erred in holding Exhibits 520, 534 and 116, all marked ballots, running counter to its own conclusion and reasoning in holding Exhibit OO–1 a good ballot for the protestant-appellee."

13. "The lower court also erred in rejecting ballot Exhibit 112 in favor of the protestee-appellant, when 'Mamuri' is clearly and unmistakably written therein in the space for mayor and the said ballot suffers of no defect at all that may invalidate it."

14. "The lower court also erred in holding ballot Exhibit 28 legal and valid for the protestant, when it is obviously an illegal ballot not pertaining to, nor forming a part of, the official ballots used in this precinct No. 11."

15. "The court A Quo lastly erred in holding Exhibit E–4, wherein 'Pili Querubin' appears clearly written in the space for mayor, valid and giving a good vote to protestant Fidel C. Querubin."

The protestant-appellee, in turn, contends, in his brief, that the lower court erred in allowing the protestee-apellant to file his amended counter-protest, but, having failed to appeal from the decision of the lower court, the former cannot now question its aforesaid act and have the same reviewed on appeal taken by the latter.

Referring now to the questions raised in the errors assigned by the protestee-appellant, the same may be divided into two major groups, namely: (1) whether or not the lower court erred in holding that the contents of the ballot boxes used in precincts Nos. 2 and 18, as found by the commissioners and said court, should prevail over the election returns for those precincts; and (2) whether or not the lower court erred in the appreciation of the ballots specified in the assignment of errors.

In connection with the first question (which is the subject matter of the first four alleged errors assigned by the protestee-appellant) the number of votes certified in said election returns (Exhibits 557, 557–*a* to 557–*c*, 573, and 573–*a* to 573–*c*), the ballots found by the commissioners upon revision of the respective ballot boxes and the result of the appreciation of the ballots for precincts Nos. 2 and

18 by the lower court are tabulated hereunder for purposes of comparison:

PRECINCT NO. 2

Names of candidates	No. of votes in the returns	Ballots found on revision	Rejected by lower court	Counted by lower court
Fidel C. Querubin	64	73	6	67
Felipe S. Mamuri	24	23	2	21
Apolonio B. Casasola	8	8	.....	.....
Venancio Gangan	9	8	.....	.....
Fulgencio Lampitoc	0	0	.....	.....
Maximino Lazaro	1	1	.....	.....
Filemon Madduma	53	49	.....	.....
Andrés Malana	1	1	.....	.....
Alberto Manaligod	4	4	.....	.....
Ricardo Paguirigan	41	43	.....	.....
Santiago Ventura	1	1	.....	.....
Tomas D. Yuson	41	39	.....	.....
None of candidates voted for Mayor	.....	4	.....	.....

PRECINCT NO. 18

Names of candidates	No. of votes in the returns	Ballots found on revision	Rejected by lower court	Counted by lower court
Fidel C. Querubin	9	16	7	9
Felipe S. Mamuri	34	32	4	28
Apolonio B. Casasola	8	8	.....	.....
Venancio Gangan	9	9	.....	.....
Fulgencio Lampitoc	49	47	.....	.....
Maximino Lazaro	4	4	.....	.....
Filemon Madduma	8	8	.....	.....
Andres Malana	1	1	.....	.....
Alberto Manaligod	0	0	.....	.....
Ricardo Paguirigan	9	5	.....	.....
Santiago Ventura	21	21	.....	.....
Tomas Yuson	2	1	.....	.....
None of Mayor	.....	2	.....	.....

It will be noted that the revision of the contents of the ballot boxes for precinct No. 2 showed, on the one hand, an increase of 9 ballots for the protestant-appellee and 2 ballots for Ricardo Paguirigan, and, on the other, a reduction of 1 ballot for the protestee, another ballot for Venancio Gangan, 3 ballots for Filemon Madduma and 2 ballots for Tomas D. Yuson. The revision, as regards precinct No. 18, resulted in an increase of 7 ballots for the protestant and a reduction of 2 ballots for the protestee, 2 ballots for Fulgencio Lampitoc and 1 ballot for Tomas Yuson. Out of the 73 ballots for the protestant found by the commissioners in the ballot box for precinct No. 2 (instead of the 64 reported in the election return [Exhibits P and 557]) the court rejected 6 and counted 67 in his favor, or 3 more than those reported in the election return; whereas, out of the 23 ballots for the protestee

found in said box by the commissioners (in lieu of the 24 reported in the election return) the court rejected 2 and counted 21 votes for the protestee, thus reducing those reported in the election return by 3 votes. As a consequence, the difference of 40 votes in favor of the protestant-appellee and against the protestee-appellant, pursuant to this return, was increased by 6 votes. Similarly, out of 32 ballots for the protestee-appellant found by the commissioners in the ballot box for the precinct No. 18 (in lieu of the 34 reported in the election return [Exhibits GG and 573]), 4 were rejected by the lower court, which, counted in his favor only 28 votes, thus reducing by 6 the number of votes adjudicated to him in the election return.

In short, the revision by the commissioners and the appreciation of the ballots by the lower court as regards precincts Nos. 2 and 18 increased the votes of protestant-appellee by 3 and reduced those of the protestee-appellant by 9—exactly the majority obtained by him, pursuant to the canvass made by the municipal board of canvassers (Exhibits N and 555)—thus giving the protestant-appellee a majority of 3 votes. If the election returns for said precincts were, however, given more weight than the result of the revision by the commissioners, then 3 votes would have to be deducted from the 667 votes adjudicated by the lower court to the protestant-appellee, leaving in his favor a balance of 664 votes, and 9 votes added to the 663 adjudicated in the decision appealed from to the protestee-appellant, thereby increasing his votes to 672 votes, so that, even if the conclusions of His Honor, the trial Judge, regarding the appreciation of ballots, which are covered by other assignments of errors (V to XV), were not disturbed, the protestee-appellant would still have an aggregate majority of 8 votes and, accordingly, said decision should be reversed. Thus, the solution of the first question is vital to this appeal.

Referring to the merits thereof, protestee-appellant maintains that the election returns should prevail over the result of the revision made by the commissioners, because there are sufficient reasons to doubt the integrity of the contents of the ballot boxes thus revised and to believe in the integrity and correctness of the election returns. After a careful review of the record we are of the opinion that this contention is well taken.

To begin with, the protestant-appellee has not specifically assailed any of said election returns (Exhibits P, GG, 553 and 557). On the contrary, he introduced the same in evidence. What is more, the election inspectors, appointed upon his recommendation (see Exhibit 6), signed said election returns, which are fully corroborated by the tally sheets (Exhibits 4, 4–*a*, 10–*g* and 10–*h*) prepared

during the canvass made by the respective boards of election inspectors and by the fact that none of the watchers present in the precincts (11 in No. 2 and 13 in No. 18 [see Exhibits 2, 2–*a* and 9]) had protested against any irregularity, either in the proceedings, in general, or in the reading of the ballots—which was made by the protestant-appellee's nominees, who presided the boards of inspectors—in the course of said canvass. Lastly, these chairmen of the boards of inspectors (Delfina S. Saquing and Mariano Apalla) who presumably belong to the faction of the protestant-appellee and represented the same, testified that they merely read what was written on the ballots of their respective precincts, and the protestant-appellee has neither contradicted their testimony nor sought to impeach their veracity.

Upon the other hand, there is satisfactory evidence to the effect that the ballot boxes were exposed to the danger of being tampered with and that some ballots were actually tampered with after the canvass made by the respective boards of inspectors. The exposure to tampering and the opportunity therefor is apparent from the fact that the ballot boxes were kept in a vault—unguarded, according to the evidence for the protestee-appellant—located in a vacant, unfenced lot, 50 to 100 meters away from the nearest building or dwelling; that the vault's door had an ordinary padlock, which could be opened by expert locksmiths with greater facility than the padlocks used in the ballot boxes, which, although of a more complicated design, were opened easily before the Court by witness Roque Pescoso; and that, in fact, the ballot boxes for the protested and counter-protested precincts were, by order of the municipal treasurer, segregated from the other ballot boxes, thus rendering it easier, for one who succeeded in entering the vault, to ascertain which boxes to tamper with.

Apart from this, the protestee has introduced evidence to the effect that on December 26, or 27, 1947, at about midnight—while the municipal treasurer was in Manila in connection with a trip the expenses of which were previously approved by the municipal council, presided over by the protestant-appellee, as incumbent mayor up to December 31, 1947—two persons were seen beside the vault in question, the shutters of which were then open.

Again, actual tampering was found by the lower court to have been established, it having said, in the decision appealed from, "it is therefore logical to conclude that the ballot marked Exhibit 469 had been *inserted* into the ballot box for precinct No. 16 *after the election and before the opening thereof by the commissioners.*" Although this finding refers to precinct No. 16, it has an important

bearing on the question of tampering of the ballot boxes for precincts Nos. 2 and 18, inasmuch as the ballot boxes for all precincts were kept in the same vault.

Indeed, the increase of 9 and 7 ballots for the protestant -appellee in precincts Nos. 2 and 18, respectively, cannot be explained—*as he has not tried to explain it*—except by the tampering of the contents of the ballot boxes after the election and before the revision made by the commissioners. It will be recalled that the protestant was the incumbent mayor before, at the time of, and for some time after the election. As the authorized representative of his party (Liberal Party), he nominated the members of boards of inspectors therefor. The protestee-appellant had filed his certificate of candidacy as member of the same party, but, evidently, he was not considered an official candidate thereof, and, although he alleges, in his brief, that he waged his campaign as an independent candidate, with all its attendant handicaps, the protestant-appellee has not even attempted to deny or question the accuracy of such statement. Admittedly, during the canvass by the boards of inspectors of all the precincts in the municipality, the chairmen of said boards, appointed upon nomination by the protestant-appellee, read the ballots and, in so doing, pursuant to their uncontradicted and uncontested testimony, they merely read the names appearing on the ballots, within the prescribed distance from the watchers. This is fully corroborated, as to precincts Nos. 2 and 18, by the fact that none of the 11 and 13 watchers present in said precincts, respectively, had protested against any irregularity during said canvass. In the light of these facts, the 9 and 7 additional ballots for the protestant found by the commissioners in the ballot boxes for said precincts, respectively, cannot be due to any cause other than the tampering aforementioned.

In this connection, it is interesting to note that although Tomas Yuson obtained 41 votes in precinct No. 2, according to the tally sheets therefor, the commissioners found 39 ballots only in his favor, or 2 less than those reported in the return. Upon examination of the ballots, it appears that "T. Yuson" was originally written, in indelible pencil, on the space for mayor in Exhibit 315. Subsequently, however, a dash was written, in lead pencil, on the middle right-hand side of the perpendicular stroke of the capital letter T, to make it appear that it is an "F" (which is the initial of appellee's Christian name). Then, "Yuzon" was crossed out with said pencil and "Querubin" written with it after the name thus stricken out, though still clearly distinguishable. Similarly, "T. Yuzon" was originally voted for mayor in Exhibit 316, but, a dash was written across the perpendicular stroke of the T—evidently, to give thereto the appearance of an F—and the letter "Q" was

superimposed over "Y" in "Yuzon". Moreover, the letters "eru" were superimposed over "zon", after erasing the tail of the z, and the letters "bin" added to the name "Yuzon", as thus corrected, so as to make it appear that the person voted for was "F. Querubin" instead of "T. Yuzon." It is clear, however, in view of the circumstances already adverted to, that the board of inspectors could not have counted these ballots (Exhibits 315 and 316) in favor of T. Yuzon, had the same been in their present condition, at the time of the canvass by said board. Likewise, it is apparent to us that Exhibits 315 and 316 must have been read by the Board of Inspectors as votes for T. Yuzon, for, with the 39 ballots found by the commissioners, they complete the 41 votes, reported in the tally sheets for precinct No. 2, in favor of said candidate. Hence, the crossing of Yuzon's name on Exhibits 315 and 316 and the writing and superimposition thereon of that of Querubin must have taken place, and we so hold, after the canvass made by the board of inspectors, but before the revision by the commissioners appointed by the lower court.

The same may be said as to Exhibit 293, in which protestee-appellant, "Felipe Mamuri" appears clearly voted for in the space for mayor, but, subsequently, crossed out with several strokes, and the letters "A B C" written on top. Pursuant to the election return for precinct No. 2, protestee –appellant obtained therein 24 votes, whereas, the commissioners found in its ballot box only 23 ballots in his favor. Exhibit 293 accounts for the difference of one ballot. We are of the opinion that protestee–appellants's name thereon must have been cancelled after the elections, for, in view of the circumstances aforementioned, said ballot could not have been counted by the board of inspectors in his favor, had it been, at the time of the canvass made by them, in its present condition.

Analogous is that of Exhibit 298, with respect to which the lower court said:

> "Exhibit 298. 'Madduma' voted on the line for Mayor written in lead pencil was cancelled with an indelible pencil and 'Querubin' was written on the same line with indelible pencil after the cancelled name. There is a great difference between the strokes of the letters in 'Querubin' and the strokes of the letters written in lead pencil. Furthermore, it appears that the penmanship of the person who wrote 'Querubin' is the same as the penmanship of the person who prepared ballot, Exhibit 307. This ballot was prepared by two hands and should be rejected."

In lieu of the 53 votes in favor of Filemon Madduma stated in the election return for precinct No. 2, the commissioners found in its ballot box 49 ballots only in his favor. The difference of 4 ballots has not been explained, but, obviously, Exhibit 298 was one of those counted by the board of inspectors for said candidate for mayor. It is evident, however—for the reasons already stated—that

it would not have done so, and instead would have counted it for the protestant-appellee, had it been in its present condition at the time of the canvass by the members of said board. In other words, the irregularity described in the decision appealed from must have been committed later, but before the revision by the commissioners.

Thus, the increase of nine (9) ballots for the protestant–appellee, found by said commissioners, is partly explained by Exhibits 298, 315 and 316, in which his name was written, after crossing out that of Madduma, from the first, and that of Yuzon, from the rest. There still are six (6) additional ballots for the protestant-appellee, which, owing to circumstances surrounding the case, and the total absence of any explanation therefor, and, even, of an attempt to explain their presence, must have been inserted into the ballot box after the election and before the revision of its contents by the commissioners.

With reference to precinct No. 18, instead of the 34 votes for the protestee-appellant set forth in the election return therefor, the commissioners found in its ballot box 32 ballots only in his favor. The two ballots lacking are, evidently, Exhibits 111 and 112, in both of which protestee–appellant's name, which is clearly written on the space for mayor, has been crossed out with two strokes of pencil. In Exhibit 112 the name "Mamuri" was first written on the space for vice-mayor. Then it was erased, though not complete, and the name rewritten on the space for mayor. Subsequently, however, it was crossed out with two strokes of the pencil. Had this taken place before the canvass by the board of inspectors, its chairman, who owed his appointment to the protestant–appellee, would not have read Exhibits 111 and 112 as votes cast in favor of the protestee-appellant, not only because his name appears to be crossed out, but, also, because that of Malana is now written on top of said name in Exhibit 111. Moreover, we are inclined to believe that the strokes crossing out protestee–appellant's name in both ballots were given with a pencil other than that with which the names had originally been written. Indeed, as regards Exhibit 112, it is improbable that the strokes were made by the voter himself, after twice writing protestee–appellant's name thereon, first on the space for vice-mayor and then, after realizing his mistake and making the aforementioned erasure, on the space for mayor, thus indicating his determination to vote for said candidate. We conclude, therefore, that Exhibits 111 and 112 were tampered with, after the counting made by the board of inspectors of precinct No. 18, and before the revision by the commissioners.

It appearing that the contents of the ballot boxes for precincts Nos. 2 and 18, like those of precinct No. 16, had thus been tampered with, thereby impeaching the integrity

of said ballot boxes (Valenzuela *vs.* Carlos, 42 Phil., 453), and that the election returns were signed by the chairmen and members of the respective boards of inspectors and are corroborated by the tally sheets, made coetaneously with the canvass by said boards; that no protest was made by any watcher—or by any other person—against irregularities in the reading of the ballots by the chairmen of said boards, who are appointed upon the protestant–appellee's recommendation; and that said election returns and tally sheets are borne out by the minutes of the respective boards, none of which has been assailed by any of the parties in this proceedings, who introduced said documents in evidence, we hold that the election returns must be considered as, and are, the best evidence of the true result of the elections in precincts Nos. 2 and 18; that the contents thereof should prevail over the result of the revision made by the commissioners; and that the protestant –appellee should be held, therefore, to have received 64 and 9 votes respectively in precincts Nos. 2 and 18, respectively, as against 24 and 34 votes, respectively, for the protestee-appellant.

Pursuant to the decision appealed from, the protestant-appellee received a total of 667 votes and the protestee-appellant 663 votes. If the election returns for precincts Nos. 2 and 18 were to prevail—as we hold they should—over the revision made by the commissioners and the court, 3 votes would have to be deducted from those adjudicated in said decision to the protestant-appellee, and 9 votes added to those adjudicated therein to the protestee–appellant, with the result that the former would have received 664 votes, and the latter 672 votes, or a plurality of 8 votes in favor of the protestee–appellant, who should, accordingly, be proclaimed duly elected as mayor of Ilagan, Isabela, irrespective of the other errors assigned in the brief for the protestee–appellant.

It may be added, also, that it would have been preferable, considering the allegations and proof of tampering of the ballot boxes—which were partly sustained by some of the findings made in the decision appealed from—if protesstee–appellant had been allowed to recall Roque Pescoso and to introduce the testimony of 24 voters of precinct No. 2, the ruling of the lower court against which is assailed in the third and fourth assignment of error. As a matter of practice, it is more advisable, in controversial questions, to err in favor of, than against, an opportunity to introduce evidence thereon, because of the considerable delay which would result, if a higher court should believe that the resolution should have been otherwise and, as a conseqquence, a new trial held.

Regardless of the foregoing, we have reached the same conclusion upon consideration of the questions raised in

the other assignments of error, relative to the appreciation of ballots.

Exhibits C–2 (or 15), I–4 (or 51) and I–16 (or 63), cast in favor of the protestee–appellant, were rejected as marked ballot because the respective voters wrote: (*a*) eight times the word "Nacionalista" on the spaces for 8 councilors in Exhibit C–2; (*b*) the words "Nacionalista Party" in the upper part of Exhibit I–4, between the instructions appearing thereon and the space for the provincial governor; and (*c*) the word "Nacionalista" in the same space on Exhibit I–16. Although we are not inclined to disturb the finding of the lower court with reference to Exhibit I–4, there being no possible explanation for the words "Nacionalista Party" written thereon, except the intent to mark the ballot, it appearing that the voter, who prepared it, had filled all the spaces available thereon for local officials, we disagree with its conclusion relative to Exhibits C–2 and I–16, it being possible, if not probable, that the voter concerned intended to convey, in Exhibit C–2, the idea that he wanted to vote for all the Nacionalista candidates for councilors, and that the person who prepared Exhibit I–16, who had filled only 3 of the 8 spaces for councilors, wanted to indicate that, as to the rest, he voted for the Nacionalista candidates.

The lower court, likewise, nullified Exhibits G–5 (or 35), G–6 (or 36), G–7 (or 37), 110 (or J) and 294, as marked ballots, simply because the words "Tepok Na," "Tepot Na," "tepok na," "te pos" and "Tepoc," respectively, were written at the bottom of the ballots, in the last space for councilors, except in Exhibits G–6 and 110, in which it appears on the penultimate space therefor. However, the explanation given by the protestee-appellant, to the effect that said words are mere corruptions of the Tagalog expression "tapus na," meaning the end or finished, plausible and has been neither assailed nor contradicted by the protestant-appellee. Besides, it is not improbable that those who prepared said ballots, all of whom had filled only *partially* the spaces for councilors, intended to state that they voted only for the candidates whose names they had written on some of those spaces and did not care to fill the other spaces or to vote for other candidates. In short, it is not unlikely that in writing the words in question, the voter wanted, not to mark the ballot, but simply to say "that is all." These five ballots should, therefore, be counted in favor of the protestee-appellant.

Regarding Exhibits I–3 (or 50) and I–9 (or 56), the lower court had the following to say:

"Exhibit I–3 (Exhibit 50-protestee). Protestant contends that the ballot is marked or countersigned because the name 'Talattad' was written on all the eight lines for councilors. Protestant's contention is well taken because the voter who seems to be intelligent, judging

from his penmanship, had no other intention in writing 'Talattad' on all the lines for councilors but to identify his ballot. The ballot being a marked one is null and void and should be rejected."

"Exhibit I–9 (Exhibit 56-Protestee). The phrase in Ilocano dialect 'Ni Lacay' (the old man) written on line 8 for councilors was written by the voter with the malicious intention to identify his ballot and, therefore, the ballot is null and void. The vote for Mayor should be deducted from the protestant" (meaning the protestee).

We are not prepared to disturb these findings, not only because they are reasonable, but, also, because the protestee-appellant has been unable to offer a satisfactory explanation for the aforementioned peculiarities of said ballots.

Exhibits I–13 (or 60) and 466 were rejected by the lower court upon the ground that the persons voted therein for mayor, namely, "F. Mano" and "Mernada," respectively, cannot be identified. Appellant contends that both ballots should be counted in his favor upon the principle of *idem sonans*. We cannot agree with this view, the similarity, if any, in the sound of his name and those written on said ballots being too remote to warrant the conclusion that the writer intended to vote for him.

Protestee-appellant contends that Exhibits G (or 13) and 530 should have been counted in his favor, notwithstanding the fact that his name appears written thereon in the spaces for councilors. There is no merit in this contention, the action of the lower court to the contrary being in consonance with the last part of Rule 3 of section 149 of the Revised Election Code, which reads:

"* * * The vote for the office for which he is not a candidate shall be counted as stray."

It is, likewise, urged that Exhibit 467 should have been counted in favor of the protestee-appellant, although his name appears written on the first line for members of the provincial board, because the word "mayor," followed by a dash, was prefixed thereto. This pretense might have been tenable had the voter not written, as he had, on the space for mayor, the name of Gabriel Basaya, which makes it rather difficult to evade the conclusion that he intended to vote for the latter, not for the protestee-appellant, for mayor. In view of this and of the aforecited provision of the Revised Election Code, the 11th assignment of error cannot be sustained.

Appellant assails the rejection of Exhibits 116, 520 and 534 as marked ballots. The findings of the lower court in connection therewith are as follows:

"Exhibit 520–protestee. After having written the candidates for Provincial Governor and the two members of the provincial board in longhand, and 'A. Lubo' on the line for Vice-Mayor and 'P. Palafox' on line one for councilors also in longhand, the voter who seems to be intelligent, in writing 'F. MAMURI' in capital letters in the space for Mayor, had no other purpose than to identify the candidates

voted for Mayor. In the opinion of the Court, the ballot is countersigned and should be rejected."

"Exhibit 534–protestee. Contrary to the contention of the protestant, this ballot was not prepared by two hands. However, in writing 'F. MAMURI' in capital letters on the line for Mayor and in writing the word 'VICE-MAYOR' also in capital letters in the space for Vice-Mayor, which is very unusual, the malicious intention of the voter to countersign his ballot is quite evident. The ballot being a marked one, is null and void and should be rejected."

"Exhibit 116–protestee. "MAMURI' was written in capital and small separate letters by the voter with the malicious intention of countersigning or marking his ballot, because being familiar with the writing process, and having written all the other names in ordinary longhand, he had no other purpose in writing 'F. MAMURI' in a different style of writing than to identify the vote of the protestee. The ballot is null and void."

We believe that Exhibit 116 should be counted in favor of the protestee-appellant, who was voted therein as follows: "F. M a M u r i". The separation of the letters of the name Mamuri, unlike the other names appearing on Exhibit 116, and the writing of the letter "F" and of the two letters "M" in block capitals, do not necessarily lead to the conclusion that the voter intended to mark the ballot. It appears that the surname M a M u r i was superimposed upon other letters which had been previously written and then erased. The voter, who, evidently, was not a dexterous writer, may have thought it advisable to separate the letters of protestee-appellant's surname, to avoid confusion with, and to distinguish the same clearly from, the letters which had been erased. Again, the letters M in Mamuri are written in the same manner as the initial M in the second space for councilor, in which "M. andrs" appears voted for, thus indicating that it is the voter's customary manner of writing said letter. In any event, his intent to mark Exhibit 116 is neither clear, nor the only possible explanation for the circumstances relied upon by the lower court.

This also, is our conclusion with regards to Exhibits 520 and 534, in which appellant was voted as "F. MAMuri" and "F. Manuri," respectively. These two ballots, like Exhibit 116, should, accordingly, be considered and counted in favor of the protestee-appellant.

Exhibit 112 (or J–2) was not counted in his favor because his name thereon appears now to be crossed out. We agree with the protestee–appellant that he is entitled to this ballot, there being—as heretofore pointed out, in the discussion of the first main question involved in this appeal—every reason to believe that his name was cancelled after the canvass made by the board of inspectors of the precinct.

It is, moreover, claimed that Exhibit 28 should not have been credited to the protestant–appellee, because it bears, at the foot thereof, the following serial number:

"9373–(Isabela)—3–2", which is the serial number of the ballots for precinct No. 18, not of those for precinct No. 11 in the ballot box of which it was found. In view of the rule to the contrary laid down in Cecilio *vs.* Tomacruz (62 Phil., 716) appellant's pretense cannot be sustained.

Again, it is maintained that Exhibit E–4 (or 23) in which Pili Querubin was voted for mayor, should not have been counted in favor of the protestant-appellee, the name of his son being Felix Querubin, for whom the vote might have been intended. We agree, with the protestee-appellant, that "Pili" is idem sonans with Felix, not with Fidel, and that, for this reason, and because there is no evidence that the protestant–appellee is known by the nickname "Pili," Exhibit E–4 should be regarded as stray ballot for mayor.

Summarizing, if the result of the revision of the ballot boxes for precincts Nos. 2 and 18 were to prevail—as it should not—over the election returns for these precincts, the total number of votes adjudicated by the lower court to the parties herein as a consequence of the appreciation of the ballots, should be modified as follows: one (1) vote (Exhibit E–4 or 23) should be deducted from the 667 votes counted by the lower court in favor of the protestant-appellee, thereby giving him a total of six-hundred sixty-six (666) votes, and eleven (11) votes (Exhibits C–2, G–5, G–6, G–7, I–16, 110, 112, 116, 294, 520 and 534) should be added to the 663 votes counted by said court in favor of the protestee-appellant, who would thereby have six-hundred seventy-four (674) votes, or a plurality of eight (8) votes over the protestant-appellee.

Whether or not the election returns should prevail over the revision made by the commissioners and the lower court, protestee–appellant, Felipe S. Mamuri, should, therefore, be, as he is hereby, proclaimed duly elected to the office of mayor of the municipality of Ilagan, Province of Isabela, with costs against the protestant–appellee, Fidel C. Querubin. It is so ordered.

Dizon and *De Leon, JJ.*, concur.

Judgment reversed.

[No. 2843–R. November 29, 1949]

FIDEL C. QUERUBIN, protestant and appellee *vs.* FELIPE S. MAMURI, protestee and appellant

1. ELECTION LAW; EVIDENCE; INTENT TO MARK A BALLOT, NOT PRESUMED.—The intent to mark a ballot is not presumed, but must be established satisfactorily, and there is no proof that the tagalog expressions "Tepoc na", "Tepot na", etc. are unknown to the residents of the locality or were written with said intent. (18 Am. Jur. 375.)

2. ID.; COUNTER-ASSIGNMENT OF ERRORS, AVAILABLE TO PROTESTANT-APPELLEE WHO DID NOT APPEAL.—The protestant-appellee may legally make counter-assignment of errors, although he may have failed to appeal from the decision of the lower court. (Sec. 178, Rev. Election Code; Balajadia *vs.* Eusala, G. R. No. 42579, Feb. 25, 1935; Mendoza *vs.* Mendiola, 53 Phil., 267; Villavert *vs.* Lim, 62 Phil., 178).

3. ID.; AMENDED ANSWER AND COUNTER-PROTEST; ADMISSIBILITY.—It appearing that the irregularities relied upon in the amended answer and counter-protest were discovered in the course of the revision of ballots by the commissioners appointed by the Court and it being settled that, *even without an amendment to the pleadings*, the Court may *motu proprio* reject illegal ballots cast in favor of any candidate, the lower court's order admitting the amended answer and counter-protest is in accordance with law. (See Valenzuela *vs.* Carlos, 42 Phil., 428, 450; Cailles *vs.* Gomez and Barbaza, 42 Phil., 496, 503.) (Mandac *vs.* Samonte, 49 Phil., 284, 297–298.) Accordingly, proof of the tampering of the ballots was held to have been properly admitted *even without an amendment of the pleadings.* (Salvani *vs.* Garduño, 52 Phil., 673, 677–678; Yalung *vs.* Atienza, 52 Phil., 781, 784; and Olano *vs.* Tibayan, 53 Phil., 168, 171; Cecilio *vs.* Tomacruz, 62 Phil., 689, 699–700.)

APPEAL from a judgment of the Court of First Instance of Isabela. Arranz, J.

The facts are stated in the opinion of the court.

Domingo L. Vergara for appellant.
Gregorio P. Formoso for appellee.

RESOLUTION

CONCEPCION, *J.:*

Protestant-appellee, Fidel C. Querubin, has moved for a reconsideration of the decision of this Court upon the following grounds:

"1. That said decision is not supported by the evidences presented and recorded before the trial court.

"2. That said decision is contrary to law and doctrine established by the Honorable High Tribunal Supreme Court of the Philippines.

"3. That said decision company overlooks the fourth and fifth counter-assignments of error contained in the protestant-appellee's brief."

I

The first ground refers to 3 sets of ballots, namely: (*a*) Exhibits 298, 315 and 316; (*b*) Exhibits C–2 (or 15) and I–16 (or 63); and (*c*) Exhibits G–5 (or 35), G–6 (or 36), G–7 (or 37), 110 (or J) and 294.

In connection with the first set, it is urged that the irregularities pointed out in the decision of this Court must have been committed after the admission of said ballots in evidence, the protestee-appellant having failed to call the attention, either to the commissioners who revised the contents of the ballot boxes, or to Court, at the time of the introduction of said ballots in evidence, to the irreg-

ularities aforementioned. The lower court said, however, in its decision:

"After the box for valid ballots for this precinct (referring to precinct No. 2) was opened by the commissioners, counsel for the protestant (referring to the protestee-appellant) impugned the legality of all the 73 ballots of the protestant, alleging that they were illegal ballots. *He contends that the ballot box for valid ballots had been tampered with after the election and before it was opened by the commissioners.* * * *." (Record, p. 314). (Italics and parenthesis supplied.)

This statement is borne out by the report of the commissioners, dated February 12, 1948 (Record, p. 169), and by the fact that Exhibits 298, 315 and 316 were introduced in evidence *by the protestee-appellant,* together with seventy other ballots, for the specific purpose of showing that the ballot box of said precinct No. 2 had been tampered with, and that the returns of its board of inspectors should prevail over the result of the physical count made by the commissioners because of irregularties allegedly committed after the preparation of said returns and before the revision by the commissioners. (Pages 527–528, t. s. n.)

Indeed, as stated in the decision of this Court:

"* * * It is interesting to note that although Tomas Yuson obtained 41 votes in precinct No. 2, according to the tally sheets therefor, the commissioners found 39 ballots only in his favor, or 2 less than those reported in the return. Upon examination of the ballots, it appears that 'T. Yuson' was originally written, in indelible pencil, on the space for mayor in Exhibit 315. Subsequently, however, a dash was written, in lead pencil, on the middle right-hand side of the perpendicular stroke of the capital letter 'T', to make it appear that it is an 'F' (which is the initial of appellee's Christian name). Then, 'Yuzon' was crossed out with said pencil and 'Querubin' written with it after the name thus stricken out, though still clearly distinguishable. Similarly, 'T. Yuzon' was originally voted for mayor in Exhibit 316, but, a dash was written across the perpendicular stroke of the 'T'—evidently, to give thereto the appearance of an 'F'—and the letter 'Q' was superimposed over 'Y' in 'Yuzon'. Moreover, the letters 'eru' were superimposed over 'zon', after erasing the tail of the 'z', and the letters 'bin' added to the name 'Yuzon,' as thus corrected, so as to make it appear that the person voted for was 'F. Querubin' instead of 'T. Yuzon'. It is clear, however, in view of the circumstances already adverted to, that the board of inspectors could not have counted these ballots (Exhibits 315 and 316) in favor of T. Yuzon, had the same been in their present condition, at the time of the canvass by said board. Likewise, *it is apparent to us that Exhibits 315 and 316 must have been read by the Board of inspectors as votes for T. Yuzon, for, with the 39 ballots found by the commissioners, they complete the 41 votes, reported in the tally sheets for precinct No. 2, in favor of said candidate.* Hence, the crossing of Yuzon's name on Exhibits 315 and 316 and the writing and superimposition thereon of that of Querubin must have taken place, and we so hold, *after the canvass made by the board of inspectors,* but *before the revision by the commissioners* appointed by the lower court." (Italics supplied.)

In other words, if the aforesaid irregularities had been committed after the admission in evidence of the ballots

just referred to, the commissioners would have found 41 votes, instead of 39, in favor of Yuzon.

Appellant's failure to point out in detail, when he offered the ballots in evidence, the irregularities committed in each might have been due either to the need to save time, in order to enable the Court to decide the case within the period allowed by law, or to the feeling that specification was unnecessary, at least, at the time of the offer, or for both reasons, and does not argue against the existence then of the irregularities in question. Thus, for instance, *protestant-appellee himself did not mention in his brief any of the circumstances upon which his motion for reconsideration is now predicated,* notwithstanding the specification made in appellants brief (pp. 23–26) of the irregularities committed in Exhibits 298, 315 and 316.

It is alleged that the findings of this Court relative to the second batch of ballots are erroneous, because:

"*a.* In the last elections which brought about this election contest, no block voting was prescribed by law; *b.* There is no evidence recorded that the Nacionalista Party and Liberal Party proclaimed official candidates for councilors for the municipality of Ilagan."

The first reason is refuted by the Revised Election Code, section 6, paragraph (*b*), of which provides that "on the second Tuesday of November, nineteen hundred and forty-seven, * * * a regular election shall be held to elect eight Senators", and Section 124 expressly authorizes block voting for national offices.

As regards the second reason, the burden of proving, that the words "Nationalista" and "Nationalista Party" were written on Exhibits C–2 (or 15) and I–16 (or 63) in order to mark the same, is, obviously, upon the party who claims that such was the intent of the voter, namely, protestant-appellee, who has neither proven nor alleged that the Nacionalista Party had not proclaimed official candidates for councilors in the municipality of Ilagan, Isabela.

With reference to the last batch of ballots, which were held valid despite the words "Tepok NA", "Tepot Na", "Tepok na", "Te pos" and "Tepoc" written, respectively, thereon, protestant-appellee alleges that "there is no evidence established in the record of this case that, in this locality, the people are familiar with the Tagalog expression 'Te poc Na'." In the first place, the Tagalog expression is "Tapos na" or "Tapos". Secondly, there is, likewise, no evidence that said people are not familiar with the expressions above mentioned. Thirdly, the Court may take judicial notice of the fact that quite a number of Tagalog expressions are known, understood and even used in other regions of the Philippines, on account of the many Tagalogs who have emigrated thereto and of the many natives of said regions who have stayed in Tagalog localities, partic-

ularly in Manila. At any rate, the intent to mark a ballot is not presumed, but must be established satisfactorily, and there is no proof that the expressions in question are unknown to the residents of the locality or were written with said intent. (18 Am. Jur. 375.)

II

It is contended that—

"If the finding of this Honorable Court of Appeals to the effect that 'whether or not the election returns should prevail over the revision made by the commissioners and the lower court' should be understood to mean that there has been no categorical pronouncement that ballot boxes for Precincts Nos. 2 and 18 had not been tampered with, the conclusion that the election returns from Precincts Nos. 2 and 18 must prevail over the ballots found in the ballot boxes is contrary to law and the doctrine laid down and reiterated by the Honorable Supreme Court."

This argument, it will be noted, is based, however, upon a hypothetical premise, namely, "if" the decision of this Court were "understood to mean that there has been no categorical pronouncement that ballot boxes for Precincts Nos. 2 and 18 had not been tampered with" (meaning, obviously, had been tampered with.) Inasmuch as the protestant-appellee does not even suggest that said premise is a fact, it follows necessarily that his aforementioned conclusions can not be sustained. Indeed, the following pronouncement was specifically made in said decision:

"It appearing that *the contents of the ballot boxes for precincts Nos. 2 and 18, like those of precinct No. 16, had thus been tampered with*, thereby impeaching the integrity of said ballot boxes (Valenzuela *vs.* Carlos, 42 Phil., 453), and that the election returns were signed by the chairmen and members of the respective boards of inspetcors and are corroborated by the tally sheets, made coetaneously with the canvass by said boards; that no protest was made by any watcher—or by any other person—against irregularities in the reading of the ballots by the chairmen of said boards, who were appointed upon the protestant-appellee's recommendation; and that said election returns and tally sheets are borne out by the minutes of the respective boards, none of which has been assailed by any of the parties in this proceedings, who introduced said documents in evidence, we hold that the election returns must be considered as, and are, the best evidence of the true result of the elections in precincts Nos. 2 and 18; that the contents thereof should prevail over the result of the revision made by the commissioners; and that the protestant-appellee should be held, therefore, to have received 64 and 9 votes in precincts Nos. 2 and 18, respectively, as against 24 and 34 votes, respectively, for the protestee-appellant." (Italics supplied.)

Protestant-appellee contends, also, that this Court should have counted Exhibit 4 (or 23) in his favor, under the principle of *idem sonans*. The same is, however, inapplicable to said ballot, it having been proven by the protestee-appellant that "Pili Querubin", which is the name written thereon, stands for "Dr. Felix Querubin", a son of protestant-appellant Felipe C. Querubin, and the latter not having even tried to refute the evidence to this effect, despite the

fact that he and his aforementioned son, Dr. Felix Querubin, were in court during the trial. It appears, furthermore, that Dr. Felix Querubin, whose nickname is "Pili", had been a candidate for membership of the provincial board.

III

The last ground of the motion for reconsideration is predicated upon the failure of this Court to pass upon the counter-assignment of errors made in protestant-appellee's brief. This failure was due to the opinion of the Court, at the time of the writing of its decision, that the protestant-appellee could not legally make said counter-assignment of errors, he having failed to appeal from the decision of the lower court. Upon further deliberation, we have reached the conclusion that our aforesaid opinion should be, as it is hereby, reconsidered (Sec. 178, Rev. Election Code; Balajadia *vs.* Eusala, G. R. No. 42579, Feb. 25, 1935; Mendoza *vs.* Mendiola, 53 Phil., 267; Villavert *vs.* Lim, 62 Phil., 178), for which reason we now proceed to consider the alleged errors pointed out in the brief for the protestant-appellee.

The first one refers to the admission of protestee-appellant's amended counter-protest. It appears that this action was initiated on November 27, 1947. Protestee-appellant's answer was filed about a month later, or on December 24, 1947. The revision of the contents of the ballot boxes, by commissioners appointed by the Court, began in January, 1948. Soon thereafter, the presentation of evidence before the Court commenced. On March 11, the amended answer and counter-protest, alleging that the ballot boxes had been tampered with, was filed. By an order dated March 12, 1948, said amended answer and counter-protest was admitted, over the objection of the protestant-appellee. Thereafter, *the presentation of the evidence continued up to April 7, 1948,* when the parties were given a period to file their respective memoranda. The decision of the lower court was rendered on April 30, 1948. Passing upon the admissibility of the amended answer and counter-protest, the lower court said:

"It appearing that the amendments which the protestee seeks to introduce in the answer and counter-protest relate to the supposed tampering of the contents of the ballot boxes of Precincts Nos. 2 and 18 which resulted, as alleged, to the decrease of the votes obtained by some candidates for the office of mayor and the illegal increase in the number of votes of the protestant, because of the 'substitution made of several ballots' after election and while the ballot boxes were under the custody of the municipal treasurer of Ilagan, Isabela; considering that *the alleged tampering of the ballot boxes and the ballots contained therein was only discovered by and made known to the protestee upon the opening of the ballot boxes by the commissioners* appointed by this court to recount the ballots; and considering further that *neither the amendments which the protestee*

seeks to introduce materially alter the nature of the affirmative defenses set forth in the answer, nor essentially change the grounds of the counter-protest because, while it is alleged in the amended answer and counter-protest that the votes of the protestant was allegedly increased with the tampering of the ballot boxes and the ballots contained therein after the election, it is also averred in the original answer and counter-protest that 'illegal votes were improperly counted for the protestant'; and considering finally that the court could reject *motu propio* illegal ballots adjudicated in favor of any candidate (see Yalung *vs.* Atienza, 52 Phil., 781) which, in effect, shall be effected should it be proved by the protestee that illegal ballots were in fact adjudicated in favor of the protestant, and inasmuch as amendment is still allowable at this stage of the proceedings (see Valenzuela *vs.* Cortes and Lopez de Jesus, 42 Phil., 428), and in view of the ruling of the Supreme Court in the case of Mandac *vs.* Samonte, 49 Phil., 284, which says:

> 'Where ballot boxes are opened before the court and in the opinion of any of the parties the contents show that they have been tampered with, said party may, in the discretion of the court, present evidence of said tampering, even though no allegation to this effect has been made in his protest.'

"Wherefore, premises considered, the amended answer embodying the counter-protest, on file in the record, is hereby admitted."

We believe that the order complained of is in accordance with law, it appearing that the irregularities relied upon in the amended answer and counter-protest were discovered in the course of the revision of ballots by the commissioners appointed by the Court and it being settled that, *even without an amendment to the pleadings*, the Court may *motu proprio* reject illegal ballots cast in favor of any candidate. (See Valenzuela *vs.* Carlos, 42 Phil., 428, 450; Cailles *vs.* Gomez and Barbaza, 42 Phil., 496, 503.) In Mandac *vs.* Samonte (49 Phil., 284, 297–298), the Supreme Court said:

"Upon the opening of the ballot boxes of the two precincts of Currimao the contents found were such as to indicate, in the opinion of the protestant, that the said ballot boxes must have been tampered with and the original ballots altered. In view of this state of the ballots, the trial judge admitted evidence tending to show that said ballot boxes had not been faithfully kept and that they had been tampered with after having been sealed by the election officers. Counsel for the protestee objected to the admission of this evidence and excepted to the ruling of the court. This point was duly raised in this court through the proper assignment of error and we are now called upon to determine whether or not said evidence is admissible in view of the fact that the protest did not contain any allegation that the ballot boxes in question had been tampered with.

"Upon this point we are of the opinion that the trial court committed *no* reversible error in admitting said evidence. When the ballot boxes were opened and it was found that their contents were such as to indicate, in the opinion of the court, that there was something wrong, the evidence of tampering has been *properly* admitted as explanatory of the state of the contents of the ballot boxes. The act of opening a ballot box and altering its contents is an offense highly condemnable which is always committed with the utmost secrecy, and the person or persons committing same always try to cover up their tracks.

"It often happens that the tampering cannot be suspected or detected and is revealed only by an examination of the contents of the box. The protestant, in many instances, cannot possibly have the necessary knowledge of the tampering in order that he may make an allegation in his protest as to the tampering with the ballot boxes, and it would serve no useful purpose to announce a rule that would require the parties in an election contest to make allegations as to tampering with the ballot boxes based on invisible facts. We believe that the correct rule is that *it must be left to the discretion of the trial court to determine when, in view of the the facts revealed by the opening of the boxes, evidence concerning the tampering with the ballot boxes is admissible as explanatory of the state of the ballots.*" (Italics supplied.)

Accordingly, proof of the tampering of the ballots was held to have been properly admitted *even without an amendment of the pleadings.*

The rule was reiterated in Salvani *vs.* Garduño (52 Phil., 673, 677–678), Yalung *vs.* Atienza (52 Phil., 781, 784), and Olano *vs.* Tibayan (53 Phil., 168, 171), in the last of which the language used was:

"The fact that neither of the parties raised the question of the illegality of said ballots either at the trial or in their pleadings, does not deprive the trial court of jurisdiction to examine them, for as this court held in the case of Yalung *vs.* Atienza (52 Phil., 781), recently decided, the institution of suffrage is a public and not a private interest, and the trial court may examine all the ballots after the ballot boxes are opened in order to determine which are legal and which are illegal, *even when neither of the parties has raised any question as to their legality.*"

In Cecilio *vs.* Tomacruz (62 Phil., 689, 699–700), the Court had the following to say:

"In his answer filed on July 30, 1934, the appellant, as protestee, interposed a counter-protest against the election of the appellee, alleging, among other irregularities, that in precincts 1 and 7 of the municipality of Talavera the election officers did not count about 20 votes in his favor but instead counted the same number of votes in favor of the appellee, which ballots were marked and, therefore, invalid. On September 14 of the same year, the appellee filed a motion praying that he be allowed to amend his protest so as to adjudicate to him the valid votes which he had obtained in the precincts which were not included in the protest and to count in his favor the votes in 36 ballots which he received in precincts 1 and 7 of Talavera which were not given to him by the election officers. The appellant vigorously objected to the petition on the ground that the amendment to the protest came too late and outside the statutory period. The court granted the petition and adjudicated to the appellee the valid votes obtained by him in said precincts. The admission of the amendment is questioned by the appellant in his second assigned error. He contends that the Election Law does not permit such amendment if filed beyond the period fixed for the presentation of the contest. We hold that the error assigned is untenable. Section 481 of the Election Law, as subsequently amended by Act No. 3387, provides that the contestant shall reply to the allegations of the counter-contest within ten days after notification. It is true that appellee's reply, in the form of an amendment to the contest, was filed *after the expiration of ten days*, but as the trial was still pending and as the same precincts have been counter-contested, we

rule that *the court did not exceed its discretion* in accepting the reply in the form of an amendment to the contest. We have held in several cases that election contests submitted to the courts affect the public interest, and that when the ballot boxes are opened by order of the court taking cognizance thereof, it is the latter's *duty* to examine all their contents and to adjudicate the valid votes found therein to either one of the candidates. And the reason for this rule is, that in such cases the primary aim must be to carry out the will of the electorate as expressed in the ballots." (Lucero *vs.* De Guzman, 45 Phil., 852; Yalung *vs.* Atienza, 52 Phil., 781; Quesada *vs.* Bagabaldo, G. R. No. 30262, February 13, 1929, not reported; Olano *vs.* Tibayan, 53 Phil., 168.)

The cases of Valenzuela *vs.* Revilla and Carlos (41 Phil., 4) and Tengco *vs.* Jocson (43 Phil., 715), relied upon by the protestant-appellee, are not in point because, in both cases, the original motion protests did not allege facts sufficient to constitute a cause of action, and to establish the Court's jurisdiction, and it was merely held that said *defects* could not be *cured* after the expiration of the period provided by law for the filing of the corresponding pleadings. In the case at bar, it is not disputed, however, that the motion protest, and the original answer, with counter-protest, were filed within the prescribed time, and contained the allegations necessary to establish a good cause of action and a good defense.

The other alleged errors assigned by the protestant-appellee refer to Exhibits G–1, G–3, G–8, G–9 and G–10, which, it is contended, should have been rejected as marked ballots, because the name of Gabriel Visaya, a candidate for governor, was voted therein in one of the spaces for councilors. Contrary to appellee's pretense, we hold that this fact is not a clear and sufficient indication of the alleged intention of the electors to mark their respective ballots (Valenzuela *vs.* Carlos, 42 Phil., 428, 465–466).

The protestant-appellee next maintains that the lower court should have counted G–12 in his favor in view of the testimony of Simplicia de Cabansag thereon. In this connection, the lower court observed:

"Exhibit G–12 (Exhibit 42–protestee). 'F. Queruben' was cancelled and 'Malana', a candidate for Mayor, is written above it. Protestant tried to prove that Patrocinia R. de Malana, wife of Andres Malana, candidate for Mayor, entered Precinct No. 11 during the voting on election day, and while Simplicia Cabansag was preparing her ballot (Exhibit G–12) in the booth, Patrocinia R. de Malana, entered therein and without the consent of the former cancelled the name of 'F. Queruben' written in the space for Mayor by Cabansag and wrote 'Malana' over it. It may be noted, however, that *there was no protest lodged with the Board of Election Inspectors, regarding this occurrence*, which by the way is the best evidence on this supposed anomally. Furthermore, *the penmanship of Patrocinia R. de Malana on Exhibit LL–3, her specimen handwriting, is different from the penmanship of the voter who prepared the ballot in question.* On the other hand, a close examination of the handwriting of Simplicia de Cabansag appearing on the ballot reveals that the initial stroke of capital letter 'M' in 'Malana' is *identical* to the initial

stroke of letter 'M' in 'F. Madamba' on the first line for Members of the Provincial Board—which shows that *Simplicia R. de Cabansag wrote these two names.* The vote for Malana is valid and the vote for 'F. Querubin' rejected." (Sec. 149, Rule 4, Revised Election Code). (Italics supplied.)

These facts, which are borne out by a physical examination of Exhibit G–12 show, beyond doubt, the lack of veracity of Simplicia de Cabansag. Hence, the above-quoted finding should be sustained.

In view of the foregoing, the motion for reconsideration is hereby denied.

Dizon and *De Leon, JJ.*, concur.

Motion denied.

[No. 2865–R. July 22, 1949]

VALENTIN DOYO and CRISPIN GALICIA, plaintiffs and appellees, *vs.* JULIO DOLIGOSA, defendant and appellant

CONTRACTS; LABOR CONTRACT; CONSTRUCTION; OBSCURITY SHOULD BE CONSTRUED IN FAVOR OF TOILING CLASS.—There being some obscurity in the labor agreement had between the parties, it is well that the same be construed in favor of the safety and decent living of the toiling class.

APPEAL from a judgment of the Court of First Instance of Iloilo. Makalintal, J.

The facts are stated in the opinion of the court.

Jose C. Divinagracia for appellant.
Cesario Golez for appellees.

DE LEON, *J.:*

Valentin Doyo and Crispin Galicia were employed as caretakers of two fishponds belonging to Julio Doligosa, situated at barrio Pulao, Dumangas, Province of Iloilo.

The first began to work as such on January 15, 1946 and the latter, on February 15, 1946. On April 15, 1946, Doligosa sold the fishponds to one Mr. Plana and as Doyo and Galicia did not choose to continue to work as such for the new owner, they demanded from Doligosa the sum of ₱1,000 as just and reasonable compensation for the labors and services performed by them on said fishponds, from the time they respectively worked as caretakers to April 15, 1946. Because Doligosa refused to pay except the sum of ₱50, this action was instituted in the Court of First Instance of Iloilo, which, after due trial, rendered judgment, ordering Doligosa to pay the plaintiff Valentin Doyo the sum of ₱180 and to plaintiff Galicia ₱120, with costs.

Doligosa has appealed from said judgment and now contends that the lower court should have sentenced him to pay only the sum of ₱24.67 to both plaintiffs and with-

out costs, because that amount is in accordance with the verbal contract he had with them and that there being such contract, the same was the law between the parties and that, therefore, there was no reason for the application in the case of the principles of equity.

Both parties apparently do not dispute the following findings of facts made by the court *a quo:*

"The defendant was the owner of two fishponds situated in sitio Dulao, barrio Cayus, municipality of Dumangas, Province of Iloilo. One of these fishponds was leased to the plaintiff Valentin Doyo from 1941 to January 1946 at a yearly rental of ₱120 according to the defendant and ₱70 according to said plaintiff. When they terminated the lease Valentin Doyo remained in the fishpond as caretaker thereof beginning January 15, 1946. The conditions of their new agreement were: that the caretaker would receive ⅓ of the products of the fishpond after deducting the expenses for fish fry put in; that the caretaker would clean the pond of unnecessary trees and repair any leakage in the dikes; that the owner would advance to the employee what subsistence he needed, the same to be charged against his share; and that in case the owner should sell the fishpond to another person he would see to it that the caretaker, if he so desired, continued to work for the new owner under the same conditions.

"The other fishpond was formerly leased to Loreto Jamero, who was getting one-third of the fish harvest as his share. On February 10, 1946 he delivered the fishpond back to the defendant, but as natural under the circumstances, he did so after he drained the pond and took out all of the fish therein, valued at ₱300. After deducting the expenses, his one-third share came out to be ₱75.88. On February 15, 1946 the defendant engaged the services of the plaintiff Crispin Galicia to take charge of this fishpond under conditions similar to those agreed upon with the plaintiff Valentin Doyo.

"On April 15, 1946 the defendant sold the two fishponds to Manuel Plana for ₱6,800. Before he did so he notified the plaintiffs of his decision to sell and asked them if they were interested in continuing to work under the prospective vendee. They expressed their unwillingness to do so because according to them what they were getting from their employment was not sufficient for their livelihood. On April 26 and 29, 1946 the one administering the fishponds for the new owner drained the same in order to clean them in preparation for the fish fry that were to be put therein. The plaintiffs were notified by the administrator that the ponds were going to be drained so that their share could be given to them, but they did not appear at all. The value of the shrimps, which were the only products taken on those two days, was ₱53 from one fishpond and ₱21 from the other.

"The plaintiffs testified that their estimate of the value of the fish in each of the ponds when they were sold on April 15, 1946 was ₱1,000. There is no showing, however, as to the basis on which such estimate was made. Two witnesses for the plaintiffs stated that when the fishponds were drained of their contents by the new owner, Manuel Plana, he got a considerable quantity of fish—14 basketful according to one witness and 16 basketful according to the other—each basketfull being worth ₱80. This testimony is difficult to believe. In the first place one of the said witnesses, namely, Salustiano Dolientes, stated that the plaintiff Valentin Doyo did not put any fish fry in the pond under his charge.

Considering that he was the former lessee of the said fishpond at a fixed annual rental, and returned it to the defendant and became a mere caretaker thereof beginning January 15, 1946 he must have taken the fish contents out before such lease was terminated. The same thing was done in the other fishpond where the plaintiff Crispin Galicia was employed beginning February 15, 1946. Loreto Jamero, who was working in that fishpond before him, drained it of its contents before turning it over to the owner, and realized the amount of ₱75.88 as his share. It cannot therefore be believed that on April 15, 1946 the contents of the two fishponds were worth ₱1,000 each, or that when they were drained on April 26 and 29 some 14 or 16 basketful of fish were taken. In fact the season for putting new fish fry into the fishponds for the ensuing year started in the month of April, and continued through May and June. It was not strange that the value of the shrimps taken from the fishponds in question on April 25 and 29, 1946, was only ₱53 from one and ₱21 from the other."

The trial court did not award to the plaintiffs the value of the one-third of the fish harvest as their respective share. Instead, his Honor awarded to Doyo the sum of ₱180 and to Galicia, the sum of ₱120, representing the reasonable compensation, at the rate of ₱2 a day, for three months for the former and for two months for the latter, aptly observing as follows:

"Notwithstanding all that has just been said, equity and justice will not allow that the plaintiffs remain uncompensated. There can be no dispute that from the time they respectively entered the defendant's employ as caretaker of his fishponds they did what was necessary to be done in connection with their work. They cleaned the ponds and made repairs in the dikes. If they did not, during the short period of their employment put in new fish fry, it obviously was not their fault, because in the nature of things is was the owner who was supposed to advance the expenses for that purpose and because, as alleged in behalf of the defendant by one of his witnesses, it was not yet the season for putting in such fish fry. The defendant sold the fishponds for ₱6,800. It is a fair presumption that the price was arrived at after taking into consideration the condition of the fishponds, or in other words, the work done by the plaintiffs to put them in that condition. To deny the plaintiffs a just remuneration for their work would in effect be to enrich the defendant at their expense. This is not legally permissible.

"The plaintiffs testified that the wages of laborers at the time were at the rate of ₱5 per day. This rate presupposes that the laborer is hired by the day and that he devotes the whole of it to the work for which he has been hired. A caretaker or watcher of fishponds is not such a laborer. The court believes that considering all the circumstances present in this case, including the length of time that the plaintiffs worked for the defendant, their compensation may be justly fixed at ₱2 a day. Valentin Doyo worked three months and Crispin Galicia two months. The first therefore should be entitled to receive ₱180 and the second ₱120."

After a review of the evidence, we are fully persuaded that the lower court did not err in deciding the case in the manner it did. There was no clear showing of any agreement between the parties to the effect that the appellees should automatically continue under any new owner

should a change of ownership happen during the life of the contract. The natural life of a contract, such as the one herein involved, is at least one agricultural year. It was for that reason that plaintiffs-appellees had agreed to receive one-third of the produce of the fishpond, after deducting the expenses for fish fry put therein. Under such understanding, appellees assisted by members of their families took care of the fishponds, cleaned them, plugged the leaks therein and did other odd jobs to prepare the same for the fishing season. They did not put in fish fry, because appellant did not advance the expenses for the purpose and because it was not yet time for putting in fish fry. However, after plaintiffs-appellees had already worked for three and two months, respectively, performing their assigned duties, appellant sold the fishponds to a third party for the sum of ₱6,800, which price must have been arrived at, taking into consideration the condition of the fishponds at the time of the sale. It, certainly, would be unconscionable to hold that plaintiffs-appellees should be paid only ₱24.67 for the entire work they and their families had done for three months, simply because that amount represents one-third of the value of the fish products gathered from the fishponds shortly after the sale thereof. There being some obscurity in the labor agreement had between the parties, it is well that we construe the same in favor of the safety and decent living of the toiling class to which appellees belong. And the learned trial judge did the right thing, when, brushing aside strict legalism, ordered the appellant to pay each of the appellees at the rate of ₱2 a day, for the entire period of their respective employments.

There being no error in the judgment appealed from, the same is hereby affirmed in all its parts, with costs against the appellant.

Concepcion and *Dizon, JJ.*, concur.

Judgment affirmed.

[No. 2444-R. July 23, 1949]

FAN LOOK, plaintiff and appellee, *vs.* PABLO ANZURES, defendant and appellant

1. CONTRACTS; CONSTRUCTION; OBSCURE TERMS, HOW CONSTRUED.—"Obscure terms of a contract shall not be so construed as to favor the party who occasioned the obscurity." (Article 1288, Civil Code.) Hence, where an attorney drafts a receipt without putting the necessary words to make it clearly understood by an uneducated layman, who was apt to understand it in another way, the obscurity should not favor said attorney who caused it.
2. ID.; ID.; OBSCURE PROVISIONS TO BE FAVORABLY CONSTRUED FOR THE PARTY FOR WHOM IT WAS MADE.—The provision of the contract that the amount "will be returned if the case against him

is not dropped" was in favor of the plaintiff. Hence, in accordance with section 65, Rule 123, the most favorable construction for the plaintiff should be adopted.

APPEAL from a judgment of the Court of First Instance of Manila. Ocampo, J.

The facts are stated in the opinion of the court.

Viola, Anzures & Abdon for appellant.
H. A. Wolfson for appellee.

JUGO, *J.:*

This is an appeal by the defendant from the judgment of the Court of First Instance of Manila, which reads as follows:

"Por todo lo expuesto, se dicta sentencia, condenando al demandado a pagar el demandante la cantidad de ₱1,270, sin intereses, y la mitad de las costas del juicio."

On March 14, 1946, the plaintiff Fan Look retained the defendant Attorney Pablo Anzures to defend him in a criminal case for illegal possession of opium. Attorney Anzures appeared for Fan Look at the investigation held by Assistant City Fiscal Dacumos of Manila. While they were waiting for the Fiscal, they talked about the amount of the fees of the defendant, as a result of which the plaintiff delivered to the defendant the sum of ₱1,500.00, for which the latter issued the following receipt, marked as Exhibit A:

"*March 14, 1946*

"Received from Mr. Fan Look the amount of One thousand five hundred pesos (₱1,500) for professional services, which amount will be returned if the case against him is not dropped.

"(Sgd.) P. ANZURES"

Fiscal Dacumos decided to file the corresponding information against Fan Look in the Court of First Instance of Manila. Attorney Anzures represented the plaintiff at the trial in said court. Fan Look was convicted. He appealed to the Court of Appeals, where he was represented by another attorney. There the decision was affirmed.

Fan Look testified that their understanding was that the sum of ₱1,500 which he delivered to Attorney Anzures would be returned to him if the case was not dismissed in the Court of First Instance. On the other hand, Attorney Anzures testified that their agreement was that he would return to Fan Look said sum if the charge was not dropped in the City Fiscal's office, and that afterward Fan Look retained his services for the trial in the Court of First Instance for a fee of ₱1,000, whether Fan Look was acquitted or convicted. Consequently, Attorney Anzures recognizes his obligation to return the ₱1,500 for the reason that the case was not dropped in the City Fiscal's office, but maintains that from said sum should be deducted

₱1,000.00, his fees for the trial in the Court of First Instance, and the further sum of ₱230 for medical services. Anzures is a physician and had rendered medical services to the plaintiff and his wife, the value of which was ₱260 of which the plaintiff had paid only ₱30. The defendant offered, therefore, to return the sum of ₱270.

The plaintiff testified that he did not owe anything to the defendant for medical services, because his wife had already delivered to the defendant the sum of ₱300.00 for same.

The important issue of this case is the meaning to be attributed to the following words in the receipt, Exhibit A, prepared and signed by the defendant: "which amount will be returned if the case against him is not dropped." The defendant contends that he would have to return the amount of ₱1,500 if the charge was not dropped in the City Fiscal's office; on the other hand, the plaintiff claims that said sum would be returned to him if the case was not dismissed definitely in the Court of First Instance.

It should be considered that it did not matter much for the plaintiff whether the case was terminated in the City Fiscal's office or in the Court of First Instance, for he must have been interested only in being freed from the charge in either place. Furthermore, the sum of ₱1,500 for a short investigation in the City Fiscal's office would seem to be exorbitant, even if the plaintiff had been freed from the charge.

It should be noted that it was the defendant, as an attorney who, in preparing the receipt, used the word "dropped" when he was dealing with a person not familiar with the terminology of the law. A Chinaman could hardly be expected to make the fine distinction between "dropping" and "dismissal," which the appellant now makes a great effort to trace with lexicographic authorities. Dealing as he was with a person of scant education, he should have drafted the receipt in such a manner as to be understood by said person, using, for example, the phrase "dropped by the City Fiscal." These four short additional words would have avoided any misunderstanding. In drafting documents it is the usual practice of attorneys to make them clear so as to avoid future litigation, and that is the reason why laymen entrust the making of deeds, contracts, and conveyances to attorneys for fear that they themselves may not express their intention clearly.

Article 1288 of the Civil Code provides as follows:

"ART. 1288. Obscure terms of a contract shall not be so construed as to favor the party who occasioned the obscurity."

We have the present situation: An attorney drafts a receipt without putting the necessary words to make it clearly understood by an uneducated layman, who was

apt to understand it in another way. This obscurity should not favor the party who caused it.

Section 65 of Rule 123 reads as follows:

"SEC. 65. *Of two constructions, which preferred.*—When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is the most favorable to the party in whose favor the provision was made."

The provision of the contract that the amount "will be returned if the case against him is not dropped" was in favor of the plaintiff. Hence, in accordance with the above principle, the most favorable construction for the plaintiff should be adopted.

The court below found that of the sum of ₱260 for medical services only ₱30 has been paid by the plaintiff and not ₱300 as he claims, for the reason that it is incredible that the plaintiff or his wife should have paid ₱300 when the account was only for ₱260. We do not find any reason for disturbing this finding of the trial court.

Deducting the sum of ₱230 from ₱1,500, the balance is ₱1,270.

In view of the foregoing, the judgment appealed from is affirmed, with costs against the appellant.

It is so ordered.

De la Rosa and *Rodas, JJ.*, concur.

Judgment affirmed.

[No. 2221-R. July 25, 1949]

GREGORIA CAMAYLONGAN ET AL., plaintiffs and appellees, *vs.* SILVERIO SACARNO ET AL., defendants and appellants

1. PLEADING AND PRACTICE; ANSWER; DEFAULT; BOTH PARTIES GUILTY OF NEGLIGENCE; TECHNICALITIES, WHEN THEY MAY BE DISREGARDED; POLICY OF THE LAW.—If the appellants were negligent in filing their answer beyond the statutory period the appellees were also guilty of having slept on their rights, and there being absolutely no showing that the delay in the filing of the answer of the appellants caused any substantial prejudice to the appellees, the most elementary sense of fairness should have prompted the trial court to deny the motion for default, it being the manifest policy of the law to accord the parties a trial upon the merits, as much as possible. Technicalities, when not conducive to the accomplishment of the purpose of the law, must be disregarded.
2. ID.; AMENDED COMPLAINT; DEFAULT, ORDER OF; ANSWER TO AMENDED COMPLAINT; REVERSIBLE ERROR.—If after the entry of an order of default against the defendant in a civil action the complaint is amended in any material or substantial respect—as was evidently the case in the one under consideration—it is reversible error for the trial court to try and decide the case upon the amended complaint without giving the defendant a new opportunity to file an answer thereto.

APPEAL from a judgment of the Court of First Instance of Surigao. Enriquez, J.

The facts are stated in the opinion of the court.

Montano A. Ortiz for appellants.
Ricardo D. Garcia for appellees.

DIZON, *J.:*

This action for forcible entry and detainer was commenced on October 3, 1946 in the Justice of the Peace Court of Tago, Surigao. Having been served with summons on October 12 the defendants filed their answer on October 15. On November 5, after due trial, the said Justice of the Peace Court rendered judgment in favor of the defendants but, upon motion of the plaintiffs filed on November 10, a new trial was granted and on December 14, after the new trial was had, the said court rendered judgment ordering the defendants to return to the plaintiffs the possession of the land described in their complaint and to pay damages in the sum of ₱200 and a monthly rent of ₱5 in case of appeal. The defendants appealed from said decision and on January 20, 1947 the required notices were sent to the parties, by registered mail, by the Clerk of the Court of First Instance of Surigao. The defendants received said notice on February 6 through an agent. Under date of February 24, Attorney Bernardino O. Almeda mailed from Cantilan, Surigao, an answer on behalf of the defendants stating therein that the latter "reproduce their answer in the Justice of the Peace Court in the Honorable Court of First Instance." According to the record, however, this answer was actually received in the office of the Clerk of the Court of First Instance of Surigao on May 12. On August 4, that is, almost three months after the answer just mentioned had been filed, the plaintiffs, through counsel, filed a motion to have the defendants declared in default, to which the latter filed an opposition on August 9 praying that they be not declared in default and that they be allowed to submit another answer attached thereto. On August 12 the trial court entered an order of default against the defendants and set the case for hearing for the presentation of the evidence for the plaintiffs. To make the pleadings conform to the evidence presented by the latter they were authorized to file, as in fact they filed on August 13, an amended complaint and, without further proceedings, on August 28 the trial court rendered the appealed judgment whose dispositive part reads as follows:

"En meritos de todo lo expuesto, el Juzgado falla esta causa a favor de los demandantes Gregoria Camaylongan y Seriano Garcia y en contra de los demandados Silverio Sacarro y Paulino Vasquez, y, en su virtud, les condena a dichos demandados a que restituyan a los demandantes la posesión de aquella porción de terreno descrita en el párrafo 3 de la demanda enmendada, a indemnizar

a los mismos demandantes, mancomunada y solidariamente, en la cantidad de Mil trescientos cuarenta y seis pesos (₱1,346,), con sus intereses legales, los cuales habrán de ser computados desde el 30 de septiembre de 1946 sobre la cantidad de ₱96, y desde el mes de julio de 1947, sobre la cantidad de ₱1,250, hasta su completa satisfacción, más las costos procesales."

Having received copy of said decision on September 23 the defendants, on October 8, filed a verified motion to set it aside, which motion was denied by the trial court on October 20. Thereafter the defendants perfected the present appeal in connection with which they now contend that the trial court committed the following errors:

I

"The trial court erred in not declaring null and void the decision and all the proceedings had in the justice of the peace court and in not dismissing the case for lack of appellate jurisdiction.

II

"The trial court erred in declaring the defendants-appellants in default when they did not receive the notices of appealed case pursuant to section 7, Rule 40, and, notwithstanding the existence of an answer filed before the motion for default was presented and of the verified opposition to said motion accompanied by another answer to the complaint.

III

"The trial court erred in admitting the amended complaint of the plaintiffs-appellees after the conclusion of the trial following the order of default and in rendering judgment upon the said amended complaint which has not been served to the defendants-appellants with the formalities required by law.

IV

"The trial court erred in denying the motion of the defendants-appellants to set aside the judgment by default altho said motion was duly verified and supported by affidavits of merits.

V

"The trial court erred in condemning the defendants-appellants to pay damages for the possession and use of the land in question when by virtue of a preliminary injunction issued by the justice of the peace court said land was placed in the hands of the plaintiffs-appellees who continued occupying it until this date."

Of the above assignments of error we need consider only the second, third and fourth.

Upon the facts stated—which are borne out by the record—we are clearly of the opinion that the trial court erred in declaring the appellants in default. The answer filed by Attorney Almeda on behalf of the appellants under date of February 24, 1947 was actually received in the office of the Clerk of Court on May 12 of the same year. At that time, it is true, the time for the filing of their answer had long expired, but it is likewise true that it was only on August 4, 1947, that is, almost three full months after the answer aforesaid had been attached to the record of

the case, that the appellees filed their motion for default. If the appellants were negligent in filing their answer beyond the statutory period the appellees were also guilty of having slept on their rights, and there being absolutely no showing that the delay in the filing of the answer of the appellants caused any substantial prejudice to the appellees, the most elementary sense of fairness should have prompted the trial court to deny the motion for default, it being the manifest policy of the law to accord the parties a trial upon the merits, as much as possible. Technicalities, when not conducive to the accomplishment of the purpose of the law, must be disregarded. We are confirmed in this opinion by the fact that the answer filed by the appellants in the Justice of the Peace Court state a good defense it appearing alleged therein that they owned the property in question and that they had been in possession thereof since the year 1908.

In the complaint filed in the Justice of the Peace Court it was alleged that the property subject matter thereof was a parcel of rice land 30 meters in length and 20 meters wide, or a total area of 600 square meters, located in sitio Enanan, barrio Somosomo, Tago, Surigao, and described as follows:

"* * * Dentro de los limites y linderos siguientes: Al Norte, con la propiedad de Rosauro Corvera, al Este, con la propiedad de Gavino Ronquillo, al Sur, con la propiedad de la demandante y al Ceste, tambien con la propiedad de la demandante." (Page 1, Record on Appeal.)

It was this property of 600 square meters that the appellants were alleged to have taken possession of on September 30, 1946 by means of violence, force, stealth and strategy. When the appellees presented their evidence, however, in the Court of First Instance of Surigao, after the appellants had been declared in default, it turned out that the property they sought to recover from the appellants was a parcel of 5 hectares, which allegedly formed part of a bigger parcel, the description of the portion allegedly detained being as follows:

"* * * Lindante al Norte Rosauro Corvera; Este con la porción restante del terreno de los demandantes; Sur, con Reachuelo Enanan y Ceste, Reachuelo Enanan." (Page 8, Record on Appeal.)

To make their pleadings conform to their evidence the appellees asked for, and the trial court gave them leave to file the corresponding amended complaint (Pages 8–9, Record on Appeal.) Upon this amended complaint and the evidence presented previous to its filing, the trial court rendered the appealed judgment.

Upon the above facts we are clearly of the opinion that the trial court erred in rendering the appealed judgment. If after the entry of an order of default against the de-

fendant in a civil action the complaint is amended in any material or substantial respect—as was evidently the case in the one we have under consideration—it is reversible error for the trial court to try and decide the case upon the amended complaint without giving the defendant a new opportunity to file an answer thereto. In the case of Atkins, Kroll & Co. *vs.* Domingo, 44 Phil., 680 the original complaint filed on September 30, 1921 was for the partition of lots Nos. 38 and 55 of the cadastral plan of the Zamboanga townsite and the improvements thereon. On November 1 the plaintiff filed an amended complaint including therein lot No. 36 and likewise the question of accounting for the rental of the properties subject matter of the action. On November 23 the plaintiff filed a motion for default, which was granted, and on January 16, 1922, after the presentation of plaintiff's evidence, the court rendered a judgment founded upon an amended complaint. The Supreme Court held that "Under the facts shown here the amended complaint and summons should have been served upon the defendants with the same formalities as the original complaint and summons." (Id., p. 683.) As a consequence the judgment of the lower court was set aside and vacated and the case remanded to the trial court for further proceedings.

Upon all the foregoing, the appealed judgment is hereby set aside and vacated, and the present case is remanded to the Court of First Instance of origin with instructions that a copy of the amended complaint be served on the appellants or their attorney, it being their duty then to file their answer thereto within the statutory period. After the filing of said answer the case should be tried on the merits, after due notice. Should the appellants fail to file their answer within the statutory period, an order of default may then be entered against them and the case heard in their absence and decided upon the amended complaint. Without special pronouncement as to costs.

Concepcion and *De Leon, JJ.* concur.

Judgment set aside with instructions.

[No. 3542–R. July 27, 1949]

FELIX DE LA FUENTE, plaintiff and appellant, *vs.* DOMINGO PALINO and NICANOR DE LA CRUZ, defendants and appellees.

1. SALE AT PUBLIC AUCTION; REDEMPTION; OFFER TO REDEEM; FAILURE TO TENDER PURCHASE PRICE PLUS INTEREST AND TAXES PAID, EFFECT OF.—Even assuming that the offer to redeem was made on the date alleged, yet in view of the fact that judgment-debtor only tendered the purchase price of ₱182.05 without offering to pay the interests thereon and the amounts paid for

taxes, as required by the Rules of Court (sec. 26, Rule 35) the judgment-creditor was justified in refusing to allow the redemption.

2. ID.; ID.; RIGHT TO REDEEM IS NOT AN OBLIGATION; MORATORIUM ORDER, NOT APPLICABLE.—The right to redeem is not an obligation. It is facultative on the part of the judgment-debtor to exercise it or not. His obligation to pay his debt was already extinguished with the sale of his property at public auction, and is beyond the purview of Executive Order No. 25 of the President of the Philippines on moratorium.

APPEAL from a judgment of the Court of First Instance of Quezon. Santiago, J.

The facts are stated in the opinion of the court.

Potenciano A. Magtibay for appellant.
Alfredo Bonus for appellees.

GUTIERREZ DAVID, *J.:*

In civil case No. 973 of the Justice of the Peace Court of the municipality of Calauag, Quezon province, entitled "Domingo Palino *vs.* Felix de la Fuente", judgment was rendered in favor of the plaintiff and against the defendant, ordering the latter to pay the former the sum of ₱135, with legal interests thereon until fully paid, damages and costs. The judgment having become final and the defendant Felix de la Fuente having failed to pay the amount thereof, a writ of execution was issued on the property of the defendant, consisting of a residential lot and house thereon, covered by Original Certificate of Title No. 37929. These properties were sold at public auction on April 29, 1941, for the sum of ₱182.05 in favor of the judgment creditor as the highest bidder (Exhibits A, B and C), subject to the right of redemption within one year from the date of the sale. The writ of execution and the certificate of sale executed by the Provincial Sheriff had been annotated on the back of the Original Certificate of Title No. 37929, although the final deed of sale had not been annotated thereon. The plaintiff and judgment-creditor in said case, after selling some of the materials of the house for the sum of ₱100, sold the lot to Nicanor de la Cruz as evidenced by Exhibit 1 on September 27, 1944, for and in consideration of the sum of ₱3,000 in Japanese war notes.

Felix de la Fuente, alleging that he had offered in due time to redeem the property in question from Domingo Palino, but the latter as well as Nicanor de la Cruz had refused to resell him the property, filed this case with the Court of First Instance of Quezon. He prays that a judgment be rendered declaring as still subsisting his right, as judgment-debtor in Case No. 973, to redeem the residential lot and house from Domingo Palino, as judgment-creditor and purchaser of said properties at public auc-

tion, or from Nicanor de la Cruz; ordering the defendants to execute the resale of said property after previous payment to them of the selling price at public auction; and sentencing the defendants to pay him the sum of ₱400 as attorney's fees and cost of some of the materials of the house which were sold by the defendant Domingo Palino.

After due trial, the court below dismissed the complaint, with costs, with the following pronouncements:

"* * * After the judgment has become final, defendant Nicanor de la Cruz may pray this Court that the owner's duplicate of original certificate of title No. 37929 of the Office of the Register of Deeds of Quezon Province (Exhibit D) be delivered to him on receipt, together with the other exhibits which he may need for the purposes of enabling him to secure the cancellation of said certificate as well as its original and the issuance in his name of the corresponding transfer certificate upon payment to the Register of Deeds of Quezon Province of the fees required by law." (Page 25, Record on Appeal.)

Felix de la Fuente interposed this appeal against said judgment. He now contends that the trial court erred in finding that he had not made any offer to repurchase the property in question within the redemption period of 1 year; in not declaring that the plaintiff had the right to repurchase the property and consequently, the sale of the property by appellee Domingo Palino to appellee Nicanor de la Cruz was illegal; in not ordering the defendants to resell him the property; and in not sentencing the defendants to pay the damages sought for.

To support this action, appellant testified that he offered to repurchase the property on April 20, 1942, for ₱182.05, the purchase price thereof, but appellee Domingo Palino refused to resell it alleging that the amount offered was insufficient to pay appellant's debts and demanded ₱400; that he did not bring the matter to court as he did not know whether he had the right to do so; that he agreed to pay the amount demanded by appellee Palino, but when he tendered payment later on, the latter refused to accept it stating that he had paid for attorney's fees; that after said refusal, he was notified by Atty. Severino Villafranca to vacate the premises and he was ousted therefrom in August, 1942, by the chief of police of Calauag, Quezon Province; that the house which was worth ₱5,000 is no longer on the lot and only its posts remain; that it is not true that appellee Nicanor de la Cruz inquired from him regarding the public auction sale of the property in question in favor of Domingo Palino, nor is it true that he told said Nicanor de la Cruz that he had lost the certificate title, which was in his (appellant's) possession but which he did not deliver to Palino because it was his intention to claim the property later if he had still the right to do so;

and that in instituting and prosecuting the present case, he had to secure the services of an attorney for the sum of ₱300.

Appellee Domingo Palino, in turn, testified that Felix de la Fuente had never repurchased said property nor had he ever offered to repurchase it; that upon consulting the justice of the peace of his town, the latter told him that after the expiration of one year the property would be absolutely his, but he should give an extension of 15 days, which he did; that after the expiration of the 15-days extension, he went to see the justice of the peace and the latter told him to give another extension of three months, which he also did; that Felix de la Fuente having failed to repurchase the property within said 3-months extension, he again went to the justice of the peace and the latter ordered the chief of police to have the appellant vacate the the premises, which he did in August, 1942; that from the time he bought the property in question until he sold it to Nicanor de la Cruz on September 22, 1943, he had been in possession thereof and the latter, in turn, was in possession of the same since he purchased it until now; and that he paid the land taxes thereon (Exhibit 2).

On the other hand, appellee Nicanor de la Cruz testified that before buying the property, he inquired from the appellant if it had already been sold at public auction to Domingo Palino and the former, having answered in the affirmative, he told him, appellant, that he was going to purchase it; that when he bought the property from Palino, the latter was the one in possession thereof; that he has declared the property for taxation purposes and has paid the corresponding taxes thereon (Exhibits 3 and 4); and that he knew that there was a certificate of title of the property, but when he went to see De la Fuente to ask for said title, the latter told him that it was lost during the war.

On the factual basis furnished by the foregoing testimonies of the parties, the trial court made the following findings regarding the alleged offer to redeem:

"The Court believe that plaintiff De la Fuente had made no attempt to repurchase the house and lot in question within one year from the date the same were sold on April 29, 1951, so much so that when asked to leave the premises, he willingly did so on one of the last days of August, 1942; otherwise he would not have left the house and would have deposited in Court the amount for their redemption. Moreover, the Court finds no reason why it should doubt the truthfulness of the coherent testimony of Domingo Palino as well as of his co-defendant Nicanor de la Cruz. If there was any attempt to redeem the properties at all, the act must have taken place after September, 1943, subsequent to the sale of some of the materials of the house, the sale of which plaintiff did not even know."

(p. 25, Record on Appeal)

In our opinion the foregoing findings are correct and duly supported by a preponderance of evidence. Moreover, even assuming that the offer to redeem was made on the date alleged, yet in view of the fact that appellant only tendered the purchase price of ₱182.05 without offering to pay the interests thereon and the amounts paid for taxes, as required by the Rules of the Court (sec. 26, Rule 35), appellee Palino was justified in refusing to allow the redemption.]

Appellant raised the point that his right to redeem involves payment of money and is, therefore, within the purview of the Executive Order No. 25 of the President of the Philippines on moratorium. There is nothing to this point. The right to redeem is not an obligation. It is facultative on the part of the judgment-debtor to exercise it or not. His obligation to pay his debt was already extinguished with the sale of his property at public auction.

There being no reversible error in the judgment appealed from, the same is hereby affirmed, with costs.

Reyes and *Borromeo, JJ.*, concur.

Judgment affirmed.